966

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901. 1902.

No. 288. 75.

THE OSHKOSH WATER WORKS COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF OSHKOSH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

FILED APRIL 3, 1901.

(18,101.)

9650

(18,101.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1901.

No. 288.

THE OSHKOSH WATER WORKS COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF OSHKOSH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

INDEX.

	Original.	Print.
Petition for writ of error	1	1
Order allowing writ of error	3	2
Writ of error	4	2
Assignment of errors	7	3
Bond on writ of error	10	5
Citation	12	6
Acceptance of service of citation	13	6
Caption	14	7
Record from circuit court, Winnebago county	15	7
Notice of appeal	15	7
Receipt for deposit	16	8
Affidavit of service of summons and complaint	17	8
Summons	18	9
Complaint	19	9
Demurrer	25	13
Order sustaining demurrer	27	14
Exception to foregoing order	27	14
Judgment	29	14
Clerk's certificate	30	15
Order taking cause under advisement	32	15
Judgment	33	16
Opinion	35	16
Dissenting opinion	55	28
Clerk's certificate	57	29

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 1, 1901.

[Reform spelling intended.]

1 To the Honorabl J. B. Cassoday, chief justice of the supreme court, State of Wisconsin:

Your petitioner, The Oshkosh Water Works Company, respectfuly states that—

In a suit between your petitioner, The Oshkosh Water Works Company, plaintif and appellant, and The City of Oshkosh, defendant and respondent, then pending upon apeal in the supreme court of the State of Wisconsin, being the highest court of the said State in which a decision coud be had in such suit, on the 26th day of February, 1901, a final judgment was renderd in favor of the said defendant and respondent, The City of Oshkosh, agenst your petitioner, The Oshkosh Water Works Company, plaintif and appellant, amung other things afirming the judgment of the Winnebago county circuit court, the trial court below, which judgment of the said Winnebago county circuit court, trial court below, was renderd on the 16th day of June, 1900, and dismist the complaint of the plaintif in the action then pending in said court wherein your petitioner, The Oshkosh Water Works Company, was plaintif and The City of Oshkosh was defendant, and ajudging that the defendant, The City of Oshkosh, do hav and recuver of and from the plaintif, The Oshkosh Water Works Company, your petitioner, the sum of sixteen dollars ($16) costs, and by which judgment of the supreme court of the State of Wisconsin it was ajudged that the said judgment of said circuit court of Winnebago county, so dismissing said complaint and for costs, shoud be, and the same thereby was, afirmd.

And your petitioner further states that—

2 The record of said caus was then, on said 26th day of February, 1901, at the time of the entry of said determination and judgment afirming said judgment of the circuit court of Winnebago county, before said supreme court upon apeal, and ever sins then has remaind and still remains before said supreme court and under its control, and which record embraces the whole proceeding in said caus from and including the original service of proces and the original pleadings, demurers, orders, judgment, and decision afirming the same; the whole of which record is now before your honor for inspection and examination.

And your petitioner further shows that—

In said suit and in the judgment therein renderd in the circuit court of Winnebago county and in the final judgment in supreme court of the State of Wisconsin, afirming the final judgment of the circuit court of Winnebago county, there was drawn in question the validity of a statute of the State of Wisconsin to wit, chapter 59 of the Laws of the State of Wisconsin for the year 1891, and especialy sections 1 and 5 of subchapter 9 of said chapter 59, on the ground of its being repugnant to the Constitution of the United States, and the decision and judgment of said circuit court of Winnebago county and

of said supreme court of the State of Wisconsin upon apeal afirming said judgment of the circuit court of Winnebago county was and is in favor of its validity agenst the contention of your petitioner, resting on and based upon the Constitution of the United States, as more fuly apears in the asignment of erors herewith presented, a copy of which is hereto atacht and made a part hereof.

3 In all of such decisions manifest eror hath hapend to the great damage of your petitioner; all of which apears in the record of said suit and proceedings now shown to you and under your control.

Wherefore your petitioner prays for the alowance of a writ of eror from the Supreme Court of the United States to the supreme court of the State of Wisconsin, to the end that such erors, if any there be, may be corected.

Dated March 13th, A. D. 1901.

MOSES HOOPER,
Atorney and Counsel for the Oshkosh Water Works Company.

The statements and alegations of the foregoing petition found to be true and the prayer thereof is granted and writ of eror alowd this 14 day of March, A. D. 1901.

JOHN B. CASSODAY,
Chief Justice of the Supreme Court of the State of Wisconsin.

[Endorsed:] Filed Mar. 14, 1901. Clarence Kellogg, clerk of supreme court Wis. Petition for writ.

[Reform spelling intended.]

4 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the chief justice and justices of the supreme court, State of Wisconsin, Greeting:

Becaus in the record and proceedings, and also in the rendition of a final judgment in a plea which is in the supreme court of the State of Wisconsin, the whole record in which plea is before you, being the highest court of law or equity of the State in which a decision coud be had in the said suit between The Oshkosh Water Works Company, plaintif and appellant, agenst The City of Oshkosh, defendant and respondent, wherein was drawn in question the validity of a statute of the State of Wisconsin, on the ground of its being repugnant to the Constitution of the United States, and the decision was and is in favor of its validity, and manifest eror hath hapend, to the great damage of the said The Oshkosh Water Works Company, abuv named, as by its complaint apears, we, being willing that such eror, if any hath hapend, shoud be duly corected and ful and speedy justice dun to the parties aforesaid in this behalf, do comand you, if judgment be givn therein, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you hav the

same at Washington on the 12th day of April next, in said Supreme Court, that, the record aforesaid being inspected, the said Supreme Court may caus further to be dun therein to corect that eror what of right and acording to the laws and customs of the United States shoud be dun.

5 Witnes the Honorabl Melville W. Fuller, Chief Justice of said Supreme Court of the United States, this 14th day of March, A. D. 1901, and of the Independence of the United States the 125th.

EDWARD KURTZ,
Clerk U. S. Circuit Court for the Eastern Dist. of Wisconsin.

Alowd by me this 14 day of March, A. D. 1901.

[Seal U. S. Circuit Court, Eastern District Wisconsin.]

JOHN B. CASSODAY,
Chief Justice of the Supreme Court of Wisconsin.

6 STATE OF WISCONSIN, *ss:*

Supreme Court.

The return to the within writ appears by the schedule hereto annexed.

The return of the justices of the supreme court of the State of Wisconsin.

CLARENCE KELLOGG, *Clerk.*

[Endorsed:] Filed Mar. 14, 1901. Clarence Kellogg, clerk of supreme court Wis. Writ of error.

[Reform spelling intended.]

7 In Supreme Court of the United States, of October Term, in the Year of Our Lord 1900, to wit, on the 13 Day of March, 1901.

THE OSHKOSH WATER WORKS COMPANY, Plaintif in Eror,
vs.
CITY OF OSHKOSH, Defendant in Eror.

Afterwards, to wit, on the 13 day of March, 1901, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, cums the said plaintif in eror abuv named, by its atorney, Moses Hooper, and says that in the record and proceedings aforesaid there is manifest eror, in this, to wit:

I.

That the complaint of the plaintif below, plaintif in eror aforesaid, is suficient in law to entitle the said plaintif in eror, plaintif below, to hav and recuver from the defendant in eror, defendant below, judgment acording to the prayer of said complaint, the demurer of the defendant in eror, defendant below, to the said com-

plaint notwithstanding, and that it was eror for the said the Winnebago county circuit court and of the supreme court of the State of Wisconsin to sustain the said demurer and to hold the complaint insuficient to entitle the plaintif in eror, plaintif below, to hav judgment as therein prayd.

II.

That by the record aforesaid it apears that the judgment aforesaid was givn for the said defendants in eror, whereas by the law
8 of the land and pursuant to the Constitution of the United States the said judgment ought to hav been givn for the said plaintif in eror agenst the said defendants in eror.

III.

In said suit and the final judgment renderd therein there was drawn in question the validity of a statute of the State of Wisconsin, to wit, chapter 59 of the Laws of Wisconsin for 1891, on the ground of its being repugnant to the Constitution of the United States, and to that claus thereof providing that "no State shal * * * pas any * * * law impairing the obligation of contracts," and the decision, which is the basis of said judgment of the said supreme court and the circuit court of Winnebago county, was in favor of the validity of such statute.

IV.

By and under said judgment of the circuit court of Winnebago county and the judgment and decision of the supreme court of the State of Wisconsin afirming the same, it was eroneusly held, as matter of law, that the amended charter of the city of Oshkosh (being chapter 59 of the enactments of the legislature of the State of Wisconsin for the year 1891, and especialy of sections 1 and 5 of subchapter 9 of said chapter 59) did not, so far as it relates to the contract set up in the complaint of the plaintif herein, impair the obligation of the contract, and it was eroneusly held that the plaintif in eror, The Oshkosh Water Works Company, coud not maintain its said action agenst The City of Oshkosh, defendant in eror, on acount of the provisions of the said amended charter (chapter 59, Laws of Wisconsin for 1891, and especialy on acount of sections 1 and 5 of subchapter 9 of said chapter 59).

9 Wherefore the plaintif in eror herein prays that the judgment of the said circuit court of Winnebago county and the judgment of the supreme court of the State of Wisconsin aforesaid, afirming the same and making the same final, as aforesaid, may be reverst, anuld, and altogether held for nothing, and that the said demurer of the said defendant, defendant in eror, The City of Oshkosh, to the complaint of the said plaintif, plaintif in eror, The Oshkosh Water Works Company, be held insuficient in law, and that the plaintif in eror, The Oshkosh Water Works Company, do hav and recuver from The City of Oshkosh, defendant in eror, its damages as stated in its said complaint, with costs of action, and that

the plaintif in eror, The Oshkosh Water Works Company, may be restored to all things which it has lost by ocasion of said judgment.

MOSES HOOPER,
Attorney for Plaintif in Eror.

[Endorsed:] Filed Mar. 14, 1901. Clarence Kellogg, clerk of supreme court Wis. As'g't errors.

[Reform spelling intended.]

10 Know all men by these presents that The Oshkosh Water Works Company of Oshkosh, Wisconsin, principal, and Leander Choate and Charles Schriber, of Oshkosh, Wisconsin, sureties, are held and firmly bound unto the City of Oshkosh in the sum of one thousand dollars, to be paid to it, the City of Oshkosh, and to its sucesors and asigns; to which payment, wel and truly to be made, we bind ourselvs, our and each of our sucesors, heirs, executors, and administrators, firmly by these presents.

Seald with the seal of the Oshkosh Water Works Company and executed by its president and secretary, and signd by and seald with the seals of said sureties, and dated this 13th day of March, 1901.

Whereas the abuv-named The Oshkosh Water Works Company hath prosecuted a writ of eror to the Supreme Court of the United States to reverse a judgment heretofore renderd in favor of The City of Oshkosh, obligee, and agenst the said The Oshkosh Water Works Company, obligor, in the supreme court of the State of Wisconsin, whereby there was afirmd a judgment of the circuit court of Winnebago county in favor of the said obligee, The City of Oshkosh, agenst the said obligor, The Oshkosh Water Works Company:

Now, therefore, the condition of this obligation is such that if the abuv-named The Oshkosh Water Works Company shal prosecute its said writ of eror to efect and answer all damages and costs if it shal fail to make good its plea, then this obligation shal be void; otherwize the same shal be and remain in ful force and virtue.

THE OSHKOSH WATER WORKS CO.,
By W. G. MAXCY, *Its President.*
11 [SEAL.] By ISABEL T. MAXCY, *Its Secretary.*
CHAS. SCHRIBER. [SEAL.]
LEANDER CHOATE. [SEAL.]

In presence of—
LOUIS C. COFFIN.
ED. M. HOOPER.

STATE OF WISCONSIN, } ss:
Winnebago County, }

We, Leander Choate and Charles Schriber, being duly sworn, each for himself says that he is worth the sum of ten thousand ($10,000) dollars in property not exempt from execution and over and abuv

all dets and liabilities, and that he is a freeholder of and resident of the State of Wisconsin.

CHAS. SCHRIBER.
LEANDER CHOATE.

Subscribed and sworn to before me this 13th day of March, 1901.

ED. M. HOOPER,
[NOTARIAL SEAL.] *Notary Public, Winnebago County, Wis.*

I aprove of the foregoing bond and of the suficiency of the sureties therein, and acept the same as good and suficient security upon the writ of eror in the foregoing-entitled caus.

Dated March 14, 1901.

JOHN B. CASSODAY,
Chief Justice of the Supreme Court of the State of Wisconsin.

[Endorsed:] Filed March 14, 1901. Clarence Kellogg, clerk of supreme court Wis.

[Reform spelling intended.]

12 UNITED STATES OF AMERICA, *ss:*

To the City of Oshkosh, Greeting:

You ar hereby cited and admonisht to be and apear at the Supreme Court of the United States, at Washington, on the 12th day of April next, pursuant to the writ of eror filed in the clerk's ofice of the supreme court of the State of Wisconsin, at the city of Madison, in the State of Wisconsin, wherein The Oshkosh Water Works Company is plaintif in eror and you, The City of Oshkosh, ar defendant in eror, to show caus, if any there by, why the final judgment renderd agenst said plaintif in eror, as in the said writ of eror mentiond, shoud not be corected and why speedy justice shoud not be dun to the parties in that behalf.

Witnes the Honorabl John B. Cassoday, chief justice of the supreme court of the State of Wisconsin, this 14 day of March, A. D. 1901.

JOHN B. CASSODAY,
Chief Justice of the Supreme Court of the State of Wisconsin.

[Endorsed:] Filed Mar. 14, 1901. Clarence Kellogg, clerk of supreme court Wis. Moses Hooper, attorney for pl'tf in error. Citation, &c. Originals.

[Reform spelling intended.]

13 Supreme Court of the United States.

THE OSHKOSH WATER WORKS COMPANY, Plaintif in Eror,
vs.
CITY OF OSHKOSH, Defendant in Eror.

I hereby aknolege service upon me of the petition for writ of eror, with alowance of same; asignment of erors; supersedeus bond, with

aproval and acceptance of same: writ of eror, with alowance of same, and citation, in the foregoing matter, which wer filed in the office of the clerk of the supreme court, at Madison, on the 14th day of March, 1901, by delivery to me of a duly certified copy of each of said papers, with certificate of filing of each thereof endorst thereon.

Dated March 23rd, 1901.

JOHN F. KLUWIN,
Attorney for Defendant in Eror, City of Oshkosh.

[Endorsed:] Filed Mar. 23, 1901. Clarence Kellogg, clerk of supreme court Wis.

14 Pleas before the supreme court of the State of Wisconsin, at a term thereof begun and held at the capitol, in Madison, the seat of government of said State, on the second Tuesday, to wit, the eighth day, of January, A. D. 1901.

Present: John B. Cassoday, chief justice; John B. Winslow, Roujet D. Marshall, Charles V. Bardeen, and Joshua Eric Dodge, justices.

CLARENCE KELLOGG, *Clerk.*

Be it remembered that heretofore, to wit, on the twenty-fifth day of June, in the year of our Lord one thousand nine hundred, came into the office of the clerk of the supreme court of the State of Wisconsin The Oshkosh Water Works Company and filed in said court its certain notice of appeal and receipt for deposit, according to the statute in such case made and provided, and also the return to such appeal of the clerk of the circuit court of Winnebago county, in said State, in the words and figures following—that is to say:

15 In Circuit Court, Winnebago County.

THE OSHKOSH WATER WORKS COMPANY, Plaintiff,
vs.
CITY OF OSHKOSH, Defendant.

To John F. Kluwin, attorney for said defendant, and Walter Lindeman, clerk of said court:

Please take notice that the plaintiff, The Oshkosh Water Works Company, appeals from the judgment rendered by the above court herein entered on the 16th day of June, A. D. 1900, in favor of the defendant, City of Oshkosh, and against the plaintiff, The Oshkosh Water Works Company, dismissing plaintiff's complaint, and for sixteen dollars costs.

Dated Oshkosh, June 18, 1900.

Yours, etc., HOOPER & HOOPER,
Attorneys for Plaintiff.

(Endorsements:) In circuit court, Winnebago county. The Oshkosh Water Works Company *v.* City of Oshkosh. Notice of appeal to supreme court. Within notice of appeal served on me and $250

deposited June 18, 1900. W. M. Lindeman, clerk Win. Co. cir. court. Within notice of appeal and notice deposit thereon endorsed served on me June 18, 1900. John F. Kluwin, attorney for defendant. On within appeal appellant has deposited with the clerk of said court $250, under section 3051, as security for costs and damages, in lieu of bond provided by sec. 3052, Wis. Rev. Stat., and taken his receipt therefor. June 18, 1900. Hooper & Hooper, pl'ff's attorneys. To John F. Kluwin, def't's attorney. Filed June 18, 1900. W. M. Lindeman, clerk of courts. Filed June 25, 1900. Clarence Kellogg, clerk of supreme court Wis.

16 In Circuit Court, Winnebago County.

THE OSHKOSH WATER WORKS COMPANY, Plaintiff,
vs.
CITY OF OSHKOSH, Defendant. } Duplicate.

The plaintif, on apealing from the judgment enterd herein June 16th, 1900, dismissing the plaintif's complaint and for sixteen dollars costs, has deposited with the clerk of this court $250 as security that the appellant wil pay all costs and damages which may be awarded agenst it on the said apeal pursuant to the provisions of Revised Statutes, section 3051 and 3052.

W. M. LINDEMAN,
Clerk of the Circuit Court.

Dated June 18, 1900.

(Endorsements:) Win. Co. cir. court. The Oshkosh Water Works Company, plaintiff, *vs.* City of Oshkosh. Receipt for deposit under sec. 3051. Duplicate original served on me June 18, 1900. John F. Kluwin, def't's attorney. Filed June 18, 1900. W. M. Linderman, clerk of courts. Filed June 25, 1900. Clarence Kellogg, clerk of supreme court Wis.

[Reform spelling intended.]

17 STATE OF WISCONSIN, } *ss:*
Winnebago County, }

Louis C. Coffin, being duly sworn, on oath deposes and says that he serv'd the anext summons and complaint on The City of Oshkosh, the defendant therein named, by delivering to and leaving with J. H. Merrill, mayor of the said city of Oshkosh, personaly, a true and corect copy thereof at the city of Oshkosh, Winnebago county, Wisconsin, on the 11th day of May, 1900, and by delivering to and leaving with Dan. Witzel, city clerk of the said city of Oshkosh, personaly, a true and corect copy thereof at the city of Oshkosh, Winnebago county, Wisconsin, on the 19th day of May, 1900.

LOUIS C. COFFIN.

Subscribed and sworn to before me this 21st day of May, 1900.

C. E. NELSON,
Notary Public, Winnebago County, Wisconsin.

(Endorsements:) Filed June 16, 1900. W. M. Lindeman, clerk of courts. Filed June 25, 1900. Clarence Kellogg, clerk of supreme court Wis.

18 Circuit Court, Winnebago County.

THE OSHKOSH WATER WORKS COMPANY, Plaintiff,
vs.
CITY OF OSHKOSH, Defendant. } No. 1.

The State of Wisconsin to the said defendant:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above-entitled action in the court aforesaid, and in case of your failure so to do judgment will be rendered against you according to the demand of the complaint, of which a copy is herewith served upon you.

HOOPER & HOOPER,
Plaintiff's Attorneys.

P. O. address, Oshkosh, Winnebago county, Wis.

(Endorsements:) Summons. Filed June 16, 1900. W. M. Lindeman, clerk of courts. Filed June 25, 1900. Clarence Kellogg, clerk of supreme court Wis.

[Reform spelling intended.]

19 In Circuit Court, Winnebago County.

THE OSHKOSH WATER WORKS COMPANY, Plaintiff,
vs.
CITY OF OSHKOSH, Defendant. } No. 1.

Complaint.

The plaintif complains of the defendant for this, that:

First Caus of Action.

I.

The City of Oshkosh is and for more than twenty years last past has been a municipal corporation organized and existing under and by virtue of the laws of the State of Wisconsin.

II.

The Oshkosh Water Works Company is and ever sins the 1st day of June, 1883, has been a corporation, commonly calld a joint stock company, organized and existing under and by virtue of the laws of the State of Wisconsin.

III.

On the 18th day of June, 1883, said The Oshkosh Water Works Company, in name of Oshkosh Water Works Company, and said

City of Oshkosh, each in consideration of the agreements of the other, enterd into an agreement whereby said The Oshkosh Water Works Company agreed to bild and maintain a water-works plant in the city of Oshkosh to suply water to said city for domestic and fire purposes, and whereby said City of Oshkosh did agree and bind itself to rent and did thereby rent from said The Oshkosh Water Works Company 200 public fire-hydrants, to be located on the mains of said The Oshkosh Water Works Company, and to be suplied with water by said The Oshkosh Water Works Company for
20 and during the term of thirty years from and after the completion of the works.

In and by said contract said City of Oshkosh agreed to pay the Oshkosh Water Works Company the rental of seventy dollars ($70) per anum for the use of each of said hydrants, payabl quarter yearly, on the 1st days of January, April, July, and October of each and every year during the term of said contract. The term of said contract extended for a period of thirty years from June 18th, 1883. Said works wer completed and accepted by said City of Oshkosh on or about the 1st day of October, 1884, and said hydrants wer located on said mains on or about the 1st day of October, 1884.

IV.

In and by said contract said City of Oshkosh also agreed with and bound itself to said The Oshkosh Water Works Company to rent from said The Oshkosh Water Works Company such hydrants as the city might thereafter require and locate upon the mains of said water works company in addition to the 200 hydrants and to pay for the same the sum of sixty dollars ($60) per anum per hydrant for the first 100 hydrants aditional. Under said last claus of said agreement said City of Oshkosh located 39 hydrants prior to the 1st day of May, 1890.

V.

The Oshkosh Water Works Company has sins making said contract duly performd all the conditions thereof on its part and has suplied such 239 hydrants with water and has by the performance of such conditions becum entitled to hav and receiv of and from the defendant the amount of rental of said 200 hydrants at seventy dollars ($70) each per anum, and also the rental of said 39 hydrants at sixty dollars ($60) each per anum, and to receiv the same quarterly, and there became due to said The Oshkosh Water Works Company from said City of Oshkosh on October 1st, 1898, on account of the quarterly rental of said 200 hydrants at $70 each per anum
21 for the third quarter of the year 1898, the sum of three thousand five hundred dollars ($3,500), and on acount of the quarterly rental of said 39 hydrants at sixty dollars ($60) each per anum, for the third quarter of the year 1898, the sum of five hundred and eighty-five dollars ($585).

VI.

That on the 1st day of October, 1898, this plaintif duly demanded of this defendant payment on acount thereof of said sums of $3,500

and $585, but this defendant then and there and at all times since said date has refused to pay said sums or any part thereof; that no part of same has ever been paid.

Second Cause of Action.

VII.

The City of Oshkosh is and for more than twenty years last past has been a municipal corporation organized and existing under and by virtue of the laws of the State of Wisconsin.

VIII.

The Oshkosh Water Works Company is and ever sins the 1st day of June, 1883, has been a corporation, commonly calld a joint stock company, organized and existing under and by virtue of the laws of the State of Wisconsin.

IX.

On or about August 31st, 1891, the plaintif and defendant enterd into an agreement, each in consideration of the agreements of the other, that the plaintif should make such extensions of its then existing water mains in said City of Oshkosh as the defendant might thereafter order, on condition that said City of Oshkosh order hydrants to be located on such extensions at the average rate of one hydrant to every 528 feet of such extensions, and in consideration thereof and that same be suplied with water the said City of
22 Oshkosh promist and agreed to pay to the plaintif for such hydrants a rental of forty dollars ($40) per anum per hydrant until the 18th day of June, 1913, hydrant rental payabl quarterly on the 1st days of January, April, July, and October of each year.

X.

Pursuant to such last-named contract, the City of Oshkosh did order extensions of the mains of the plaintif as follows: 1,050 feet on Fifth street, 1,124.8 feet on Frankfort street, 5,568.4 feet on Merritt, Hazel, and Polk streets and plaintif's land, 2,116 feet on Mt. Vernon street, 3,573 feet on New York avenue, 1,170.8 feet on Elm street, 3,395 feet on Scott street, 1,654 feet on Sixth street, 1,821.6 feet on Ninth street, 1,152 feet on Fourteenth street, 282 feet on Kansas street, 2,437 feet on Seventeenth street, 2,442.4 feet on Doty street, 524 feet on Algoma street, 2,960 feet on West Algoma street, 2,613 feet on Thirteenth street, 948 feet on East Irving street, 2,914 feet on New street and First avenue, 2,635 feet on Barber avenue, 1,056 — on Jackson street, 3,882 feet on School and Otter streets, 1,056 feet on Main and Custer streets, 775 feet on Kansas street, 540 feet on Bauman avenue, 1,297 feet on Tenth street, 2,717 feet on Pearl street, 528 feet on Ackerman street, 845 feet on Dakota street, 416 feet on Punhoqua street, 530 feet on Tenth street, 1,073 feet on Oregon street, 935 feet on Broad street; on acount of which ex-

tensions this plaintif was entitled that the City of Oshkosh should locate under such contract 106 hydrants, and on such extensions and on such other mains as plaintif and defendant agreed upon by way of substitution the City of Oshkosh did locate 95 hydrants prior to the 1st day of October, 1898, and plaintif has ever sins suplied such hydrants with water.

In consideration that this plaintif woud not then demand and insist upon the location of other hydrants upon the extensions of its mains as hereinbefore last stated, but woud leav the city at
23 liberty to locate such hydrants thereafter on its mains in such parts of the city of Oshkosh as the city might chuze, the said city agreed with this plaintif on or about the — day of March, 1893, to pay it for the number of unlocated hydrants, on the basis of one hydrant to each 528 feet of extension, upon said extensions of its mains, the said anual rental of $40 per anum for each unlocated hydrant, and that the plaintif has duly performd all the conditions of said contract on its part to be performed, whereby the plaintif became entitled to hav and receiv of and from the defendant, The City of Oshkosh, on acount of such extensions of its mains and the location of said 95 hydrants and the agreement respecting the other 11 unlocated hydrants, $40 per anum on 106 hydrants, and on acount of which there became due to this plaintif from the City of Oshkosh on the 1st day of October, 1898, for hydrant rental for the third quarter of the year 1898 the sum of one thousand and sixty dollars ($1,060).

XI.

That on the 1st day of October, 1898, this plaintif duly demanded of this defendant payment on acount thereof of the said sum of $1,060, but said defendant, The City of Oshkosh, then and there and at all times sins said date has refused to pay the said sum or any part thereof; that no part of same has ever been paid.

Wherefore the plaintif demands judgment agenst the City of Oshkosh for the sum of five thousand one hundred and forty-five dollars ($5,145) and interest thereon from the 1st day of October, 1898, besides the costs of this action.

HOOPER & HOOPER,
Plaintif's Atorneys.

STATE OF WISCONSIN, } ss:
Winnebago County, }

W. G. Maxcy, being duly sworn, on oath deposes and says
24 that he is the president of The Oshkosh Water Works Company, the plaintif in the foregoing action, and makes this verification in its behalf; that he has red the foregoing complaint and knows the contents thereof, and that the same is true of his own knolege.

W. G. MAXCY.

Subscribed and sworn to before me this 10th day of May, 1900.
C. E. NELSON,
Notary Public, Winnebago Co., Wis.

(Endorsements:) No. 1. In circuit court, Winnebago county. The Oshkosh Water Works Company, plaintiff, *vs.* City of Oshkosh, defendant. Summons and complaint. Original. Hooper & Hooper, for plaintiff. File 770. Filed June 16, 1900. W. M. Lindeman, clerk of courts. Filed June 25, 1900. Clarence Kellogg, clerk of supreme court Wis.

25 In Circuit Court, Winnebago County, Wisconsin.

THE OSHKOSH WATER WORKS COMPANY, Plaintiff,
versus
CITY OF OSHKOSH, Defendant. } (Case 1.)

To the first cause of action of the complaint herein the defendant, The City of Oshkosh, demurs upon the ground that, as it appears upon the face thereof—

1.

This court has no jurisdiction of the person of the defendant or of the subject of the action.

2.

That the plaintiff has not legal capacity to sue.

3.

That the complaint does not state facts sufficient to constitute a cause of action.

To the second cause of action the defendant herein, The City of Oshkosh, demurs upon the ground that, as it appears upon the face thereof—

1.

That this court has no jurisdiction of the person of the defendant or of the subject of the action.

2.

That the plaintiff has no legal capacity to sue.

3.

That the complaint does not state facts sufficient to constitute a cause of action.

JOHN F. KLUWIN,
Attorney for Defendant.

26 (Endorsements:) (Case 1.) In circuit court, Winnebago county. The Oshkosh Water Works Company *vs.* City of Oshkosh. Demurrer. John F. Kluwin, attorney for defendant. Service of the within demurrer by copy admitted this 8th day of June, A. D. 1900. Hooper & Hooper, plaintiff's att'ys. Filed June 16, 1900. W. M. Lindeman, clerk of courts. Filed June 25, 1900. Clarence Kellogg, clerk of supreme court Wis.

27 In Circuit Court, Winnebago County, Wisconsin.

THE OSHKOSH WATER WORKS COMPANY, Plaintiff,
vs.
CITY OF OSHKOSH, Defendant. } No. 1.

May term, 1900, court-house, Winnebago county, Wisconsin.

Present: Hon. G. W. Burnell, judge.

The issues of law raised herein by the demurrer of the defendant to the complaint of the plaintiff in this action duly coming on to be heard upon due notice, Hooper & Hooper appearing for plaintiff, and John F. Kluwin for defendant, the plaintiff having urged in opposition to said demurrer the provisions of the Constitution of the United States following, to wit, "No State shall * * * pass any * * * law impairing the obligation of contracts," and having stated in open court that the plaintiff did not desire to amend its complaint or to serve an amended complaint herein, it is considered that the demurrer herein is well taken, and it is—

Ordered that the same be sustained, and that the defendant have judgment dismissing the complaint of the plaintiff and for its costs.

June 16th, 1900.

By the court:

GEO. W. BURNELL, *Judge.*

And now comes the plaintiff, after the making of the foregoing order and before the entry of judgment, and excepts to the same on account that it is contrary to law.

HOOPER & HOOPER,
Attorneys for Plaintiff.

28 (Endorsements:) In circuit court, Winnebago county. The Oshkosh Water Works Company *vs.* City of Oshkosh. Order sustaining defendant's demurrer. Filed June 16, 1900. W. M. Lindeman, clerk of courts. Filed June 25, 1900. Clarence Kellogg, clerk of supreme court Wis.

29 In Circuit Court, Winnebago County, Wisconsin.

THE OSHKOSH WATER WORKS COMPANY, Plaintiff,
vs.
CITY OF OSHKOSH, Defendant. } No. 1.

The demurrer of the defendant to the complaint of the plaintiff herein having been brought on for hearing, and the counsel for the respective parties having appeared and presented their arguments, and the same having been considered by the court and said demurrer having been sustained, and plaintiff having stated in open court that it did not desire to amend its complaint or to serve an amended complaint herein, and thereupon judgment having been ordered thereon in behalf of the defendant against the plaintiff, it is now, on motion of John F. Kluwin, attorney for the defendant—

Considered and adjudged that the complaint of the plaintiff be, and the same is hereby, dismissed; and it is further—

Considered and adjudged that the defendant, City of Oshkosh, do have and recover of and from the plaintiff, The Oshkosh Water Works Company, the sum of sixteen dollars ($16) costs.

June 16, 1900.

By the court:

GEO. W. BURNELL, *Judge.*

(Endorsements:) In circuit court, Winnebago county. Oshkosh Water Works Company *vs.* City of Oshkosh. Judgment dismissing complaint. Filed June 16, 1900. W. M. Lindeman, clerk of courts. Filed June 25, 1900. Clarence Kellogg, clerk of supreme court Wis.

30 In Circuit Court, Winnebago County, Wisconsin.

THE OSHKOSH WATER WORKS COMPANY, Plaintiff,
against
THE CITY OF OSHKOSH, Defendant.

STATE OF WISCONSIN, } ss:
County of Winnebago, }

I, W. M. Lindeman, clerk of the circuit court in and for Winnebago county, Wisconsin, do hereby certify that the papers hereto attached are the original papers and records necessary on appeal filed and of record in my office in the above-entitled cause, and that the same are hereby transmitted to the supreme court of Wisconsin pursuant to such appeal.

In witness whereof I have hereunto set my hand and [SEAL.] affixed the seal of said circuit court this 19th day of June, A. D. 1900.

W. M. LINDEMAN, *Clerk.*

31 (Endorsements:) Circuit court, Winnebago county. The Oshkosh Water Works Company, plaintiff, *vs.* The City of Oshkosh, defendant. Appeal to supreme court. Filed June 25, 1900. Clarence Kellogg, clerk of supreme court Wis.

32 And afterwards, to wit, on the twelfth day of January, A. D. 1901, the same being the fifth day of said term, the following proceedings were had in this court in said cause—that is to say:

Winnebago Circuit Court.

OSHKOSH WATER WORKS COMPANY, Appellant,
vs.
CITY OF OSHKOSH, Respondent.

And now, at this day, came the parties herein, by their attorneys, and this cause having been argued by Moses Hooper, Esq., for the said appellant and by John F. Kluwin, Esq., for the said respondent

and submitted, and the court, not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

33 And afterwards, to wit, on the twenty-sixth day of February, A. D. 1901, the same being the nineteenth day of said term, judgment was rendered in said cause by this court in the words and figures following—that is to say:

Winnebago Circuit Court.

OSHKOSH WATER WORKS COMPANY, Appellant, *vs.* CITY OF OSHKOSH, Respondent. } Opinion by Justice Dodge.

This cause came on to be heard on appeal from the judgment of the circuit court of Winnebago county and was argued by counsel; on consideration whereof it is now here ordered and adjudged by this court that the judgment of the circuit court of Winnebago county in this cause be, and the same is hereby, affirmed, with costs against the said appellant taxed at the sum of forty-eight and $\frac{75}{100}$ dollars ($48.75).

Justice Bardeen dissents.

34 And thereupon this court, by Justice Dodge, filed its opinion in said cause in the words and figures following—that is to say:

35 OSHKOSH WATER WORKS COMPANY, Appellant, *vs.* CITY OF OSHKOSH, Respondent.

This is an appeal by the plaintiff from judgment dismissing his complaint entered on sustaining a demurrer thereto. The complaint alleged the making of a contract between the plaintiff and the defendant on June 18, 1883, for payment to the plaintiff, quarterly, of a certain sum as compensation for supplying the water to hydrants for fire and other city purposes; the construction of water works by the plaintiff in compliance with that contract on or before October 1, 1884, and the refusal of the city, on demand, to pay the hydrant rental, amounting to $4,085, earned under such contract for the quarter ending October 1, 1898; also the making of a subsequent contract on August 31 for payment of hydrant rentals on certain extensions, the performance thereof by the plaintiff, and refusal by defendant to pay the hydrant rental earned thereunder for the same quarter, amounting to $1,060. The demurrer was on three grounds: First, want of jurisdiction of the person or of the subject of the action; second, that plaintiff has not legal capacity to sue, and third, that the complaint fails to state facts sufficient to constitute a cause of action.

DODGE, *J.*:

The only assignment of error argued by appellant is that the court erred in holding that the charter of the city of Oshkosh, ch. 59, Laws of 1891, did not, so far as it relates to the contract of June 18, 1883, impair the obligation of the contract. It is contended that said charter does so impair and therefore contravenes sec. 12, art. I, of the constitution of Wisconsin, which provides: "No bill of attainder, *ex post facto law*, nor any law impairing the obligation of contracts, shall ever be passed."

36 At the time of making the contract of June 18, 1883, the city of Oshkosh existed and operated under a charter known as ch. 183 of P. and L. Laws of 1883, the first section of which constituted it "a municipal corporation by the name of the city of Oshkosh, and by that name capable of suing and being sued in all courts of law and equity." That charter, sec. 1, ch. VII, provided that moneys "shall be drawn out only upon the order of the mayor and city clerk, duly authorized by vote of the common council," and by sec. 10, ch. VII, "any account or demand against the city before acted upon or paid, the council may require the same to be verified by affidavit, except salaries and amounts previously fixed or determined by law." Except for these restrictions upon the payment of money, the city of Oshkosh was subject to suits upon contract liability, like any other person or corporation.

In 1891 was enacted a revised charter, ch. 59, P. & L. Laws of 1891, continuing substantially the provisions formerly existing in the first section and in sections 1 and 10 of ch. VII. That charter, however, contained a subchapter, XXI. It provided: "Section 4. No action shall be maintained by any person against the city upon any claim or demand until such person shall first have presented his claim or demand to the common council for allowance, and the same shall have been disallowed in whole or in part; provided, that the failure of such common council to pass upon such claim within sixty days after the presentation thereof shall be deemed a disallowance thereof.

"SECTION 5. The determination by the common council disallowing in whole or in part any claim shall be final and conclusive and a bar to any action in any court founded on such claim, unless an appeal shall be taken from the decision of such common council as in this act provided."

Section 6 provided for the appeal in case of disallowance in whole or in part, to be accomplished by serving a written notice of
37 the appeal on the city clerk within twenty days after the disallowance of the claim, and by executing a bond to the city in the sum of $150, with two sureties, to be approved by the city attorney and comptroller, conditioned for the faithful prosecution of the appeal and payment of costs, whereupon the clerk is required to transmit the decision and a brief statement of the proceedings and all papers to the clerk of the circuit court of the county, where "such case shall be entered, tried, and determined in the

same manner as cases originally commenced in said court," costs to be recovered by plaintiff in case of an increase in the recovery.

This amendment of the charter of Oshkosh was but one of many such amendments to city charters occurring at about that time significant of a marked change of legislative policy with reference to enforcement of money demands against cities. That policy was signified by its adoption in the general city charter promulgated by the legislature of 1889 for cities thereafter to be organized. That policy has been considered by this court in a series of decisions which it is believed have fully recognized and emphasized it. We have held that the preliminary steps are jurisdictional, and that unless complied with the court fails to acquire jurisdiction of the subject-matter; that the various steps are mandatory and cannot be waived by the officers of the city, nor can jurisdiction be conferred by such officers—Telford *v.* Ashland, 100 Wis., 238; Oshkosh Water Works Co. *v.* Oshkosh, 106 Wis., 83; that the bond cannot be amended nor a new bond given after the expiration of the twenty days—Oshkosh Water Works Co. *v.* Oshkosh, *supra*.

It is, of course, obvious that the amendment of the charter does not expressly and directly affect the obligation of any existing contracts. It is a change of the law regulating the remedy, and obviously, too, with only that purpose in view. The question, therefore, which is presented before us is whether, as to claims
38 which have not been allowed by the council (for there is no allegation that this has been allowed), the change in the methods open to a creditor of the city for the adjudication and recovery of such claim is such that although acting directly only on the remedy, it necessarily impairs the obligation of the contract itself.

We here enter a field redundant of learned discussion, philosophy, and decision, in which, as remarked by Mr. Justice Shiras, the very frequency of decision would appear to have rendered it difficult to apply the result of the court's deliberations to new cases differing somewhat in their facts from those previously considered. Barnitz *v.* Beverly, 163 U. S., 121. Several general propositions are, however, settled so as to require in new cases merely their application. First and most primary amongst these is that an act which in any degree, no matter how slightly, modifies the obligation of the contract by attempting to relieve the one party from any duty by the contract assumed is repugnant to the constitutional prohibition. This rule applies to "legislation which affects the contract directly, and not incidentally or only by consequence." Von Hoffman *v.* Quincy, 4 Wall., 553. Another general rule early established is that over mere remedial procedure the power of the legislature is absolute; that laws regulating it involve so much the consideration of public convenience and welfare that individuals cannot be conceded vested rights therein. For example, it would be intolerable that new laws regulating place or frequency of the sitting of courts could not be enacted and be effective generally, even as to pre-existing rights of individuals, although remotely they affect those rights by adding inconvenience or delay to their enforcement.

It is obvious, however, that rights, whether contractual or other, are so dependent for their value upon the means of enforcing them that for all practical purposes their extinction may be accomplished by laws which in form affect only the remedy. It matters little whether it be enacted that certain debts are extinguished or merely that they shall not be enforcible in any forum. In either case the legally binding obligation to pay is destroyed. One of the best actual illustrations of such a result is exhibited by Cornell *v.* Hichens, 11 Wis., 368, where was considered an enactment that in any suit on negotiable bonds and mortgage given to a railway company, although brought by an innocent holder for value, the defendant might answer, alleging misrepresentation in procurement or want of consideration; that such issue should then be tried by a jury, and that if the jury found such fact to exist judgment should be entered for the defendant. That law ostensibly regulated the remedy only, the pleadings and procedure in the course of a suit, but its direct and obvious intention and result was to absolve the defendant from his promise, by law embodied in the negotiable bond, that he would pay the amount to any *bona fide* holder, even though it had been obtained from him by misrepresentation or without consideration, a result prohibited by the Constitution.

In attempted recognition both of the necessity for freedom of general legislation as to remedies and procedure and of the constitutional inviolability of the obligation of contracts, the courts early sought middle ground on which both rights might be protected. In Wisconsin the limits of that middle ground have received definition in a multitude of cases, important among which are the following: Lightfoot *v.* Cole, 1 Wis., 26, 33; Von Baumbach *v.* Bade, 9 *id.*, 559; Starkweather *v.* Hawes, 10 *id.*, 125; Cornell *v.* Hichens, 11 *id.*, 368; Streubel *v.* Railway, 12 *id.*, 67; Oatman *v.* Bond, 15 *id.*, 20; State *ex rel.* Soutter *v.* Madison, 15 *id.*, 30; Paine *v.* Woodworth, 15 *id.*, 298; Hasbrouck *v.* Shipman, 16 *id.*, 296; Selsby *v.* Redlon, 19 *id.*, 17; Nelson *v.* Rountree, 23 *id.*, 367; Sydnor *v.* Palmer, 32 *id.*, 406, 410; Northwestern Mutual Ins. Co. *v.* Reeves, 46 *id.*, 147; Lee *v.* Buckheit, 49 *id.*, 54; Rosenthal *v.* Wehe, 58 *id.*, 621; Hall *v.* Banks, 79 *id.*, 229; Second Ward Savings Bank *v.* Schranck, 97 *id.*, 250; Peninsular L. & C. Works *v.* Union O. & P. Co., 100 *id.*, 488; Eau Claire Bank *v.* Macauley, 101 *id.*, 304.

In Lightfoot *v.* Cole, 1 Wis., 26, 34, in discussing a statute which abolished the pre-existing common-law and equitable suits on claims against insolvent estates and substituted in lieu a presentation and hearing before commissioners appointed by probate court, this court, by Crawford, J., declared "it was entirely within the control of the legislature to prescribe and modify the remedies which might be pursued in the courts of the Territory, and to provide one particular manner of proceeding, to the exclusion of others, so long as some specific remedy was preserved." The subject received more thorough consideration in Von Baumbach *v.* Bade, 9 Wis., 559, where was presented a law providing that in suits to foreclose mortgages defendant should have six months to answer before default,

instead of twenty days, and that notice of sale should be published six months, instead of six weeks, as theretofore required. The rule under consideration was there laid down, page 577, by Dixon, C. J., as follows: "It being determined that the remedy or laws for enforcement of a contract existing at the time it is made enter into it and form a part of its obligation, it might perhaps be supposed that any repeal, change, or amendment of such remedy or laws which in any manner delayed or rendered the enforcement of the contract less complete and effectual would be unconstitutional and void; but such is not the case. All the authorities agree that it is within the power of the legislature to repeal, amend, change, or modify the laws governing proceedings in courts, both as to past and future contracts, so that they leave the parties a substantial remedy according to the course of justice as it existed at the time the contract was made." The court also adopted the following language from Bronson *v.* Kinzie, 1 How. (U. S.), 311: "Al-
41 though a new remedy may be deemed less convenient than the old one and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the constitution."

This subject received renewed careful attention in the recent cases of The Second Ward Savings Bank *v.* Schranck, *supra*, and Peninsular L. & C. Works *v.* Union O. & P. Co., *supra*, where the rule of Von Baumbach *v.* Bade was substantially reasserted, it being said in elucidation thereof by Pinney, J.: "Any legislation, though acting merely on the remedy, that substantially impairs or lessens the value of a contract is forbidden by the constitution, and therefore void."

The latest declaration of the rule on this subject by the Supreme Court of the U. S. is found in McCullough *v.* Virginia, 172 U. S., 102, 124, as follows: "It is equally well settled that changes in the forms of action and modes of proceeding do not amount to an impairment of the obligations of a contract if any adequate and efficacious remedy be left."

It is conceived that the various forms of expression adopted are intended to express the same idea, namely, that if neither party is relieved from performing anything of that which he obliged himself to do the obligations of the contract are not impaired, but if he be absolved from performing any of those things such obligations are impaired, whether the absolution is accomplished directly and expressly or indirectly and only as a result of some modification
of the legal proceedings for enforcement. As the sub-
42 ject is in every case an important one, and as the attempts of different writers and jurists to express the true rule thereon do not entirely agree, and at best seem to be capable of different interpretations, it has seemed to me advisable, even at the expense

of considerable space, to bring together the concrete instances of application of that rule by this court and by the Supreme Court of the United States, which is, of course, the ultimate authority. The following are substantially all of the important cases in this court and the most typical of those in the United States Supreme Court, which are valuable illustrations under the rule we are now considering:

A statute cutting off all ordinary and common-law proceedings previously existing for enforcement of claims against executors when the estate was insolvent, and prescribing a special remedy by presentation and proof before commissioners of the probate court and ratable sharing in the assets, held within the power of the legislature, because some specific remedy was preserved. Lightfoot *v.* Cole, 1 Wis., 26.

An act changing the time for answer and default from twenty days to six months in foreclosure actions, and changing notice of sale from six weeks to six months, held not to impair the obligation of pre-existing mortgages. Von Baumbach *v.* Bade, 9 Wis., 559.

The same act held applicable to sales under pre-existing judgments and sustained. Starkweather *v.* Hawes, 10 Wis., 125.

A law giving a laborer for railroad contractors right of recovery against the company amended after performance of work so as to take away that right held not to impair the contract of indebtedness between the laborer and his employer, but merely to take away one of two remedies, leaving still an adequate remedy against his debtor. On rehearing it was concluded that the earlier statute created a contract between the laborer and the railroad company, and the obligation of such contract was by the later act impaired, because the only remedy was destroyed. Streubel *v.* Railway, 12 Wis., 67.

Change of procedure in method of acquiring and enforcing log liens not unconstitutional as applied to existing claims. Paine *v.* Woodworth, 15 Wis., 298.

Statute validating executions under justice of the peace judgments held constitutional. Selsby *v.* Redlon, 19 Wis., 17.

A statute enacted after a judgment in ejectment, taking away the pre-existing right, of course, to a motion and order for a new trial, held matter of remedy only and valid. Sydnor *v.* Palmer, 32 Wis., 406.

Change of procedure for foreclosure of mortgages, whereby, instead of an immediate personal judgment, to be followed by an immediate sale, subject to one year's redemption, there was only permitted a judgment postponing the sale for one year and allowing a personal judgment only for the deficiency to be ascertained after such sale, held to merely regulate the remedy and not impair obligations of the mortgage. Northwestern Mut. Ins. Co. *v.* Neeves, 46 Wis., 147.

A statute imposing additional terms on change of venue, held goes only to remedy, affects pre-existing actions, and not unconstitutional. Lee *v.* Buckheit, 49 Wis., 54.

Change of practice as to mechanics' liens from law to equity, with substantial alteration as to form of judgment, method of sale, etc.,

ch. 143, R. S. 1878, held applicable to pre-existing claims; constitutionality apparently never questioned. George *v.* Everhart, 57 Wis., 397.

Existing law made validity of attachment depend on sufficiency of accompanying affidavit. Subsequent statute permitting attachment to stand on amended affidavit afterward filed held remedial only and to apply to pre-existing contracts and suits. Rosen-
44 thal *v.* Wehe, 58 Wis., 621.

Abolition of imprisonment for debt held no impairment of contract. Sturges *v.* Crowninshield, 4 Wheat., 122; Penniman's case, 103 U. S., 714.

Reasonable additional exemptions from execution do not impair obligation of contract. Bronson *v.* Kinzie, 1 How. (U. S.), 311; Edwards *v.* Kearzey, 96 U. S., 595, 604, opinions Hunt and Clifford, JJ.; *contra*, S. C., Swayne, J.

Statute changing the law by requiring that suit on notes owned by banks be brought in the name of the cashier does not impair the obligation of contracts. Crawford *v.* The Mobile Bank, 7 How. (U. S.), 299.

Existing law as to sale of decedent's real estate required it to be at public, open sale on full notice, and new law authorized a private sale under direction and approval of the court. Held no impairment of existing contracts between estate and its creditors. Florentine *v.* Barton, 2 Wall., 210.

Imposing a notice as a condition of taking out tax deed held no impairment of contract embodied in the certificate. Curtis *v.* Whitney, 13 Wall., 68, affirming Curtis *v.* Morrow, 24 Wis., 664.

Where charter of corporation required service of process on its president a subsequent statute authorizing service on other officers held not to impair the contract. Cairo, etc., R. R. Co. *v.* Hecht, 95 U. S., 168.

Statutes of limitation, provided reasonable time is allowed for commencement of suit. Terry *v.* Anderson, 95 U. S., 628; Koshkonong *v.* Burton, 104 *id.*, 668; Mitchell *v.* Clark, 110 *id.*, 633; Relyea *v.* Tomahawk P. Co., 102 Wis., 301.

Under pre-existing law State bank bills were made receivable for taxes. Tax-payer could compel receipt by mandamus or have other common-law remedies. New law prohibited their receipt
45 and also prohibited any process to compel it, and denied all remedy except to allow payment under protest after tendering the bank bills and a suit substantially against the State to recover back, the judgment to be enforcible only by entitling claimant to a comptroller's warrant, payable when funds were in State treasury. Held that an adequate remedy being given, there was no impairment of the obligations of the contract resulting from the cutting off of the former existing remedies. Tennessee *v.* Sneed, 96 U. S., 69; Antoni *v.* Greenhow, 107 *id.*, 769; McCullough *v.* Virginia, 172 *id.*, 102, 124.

Nor did impairment result from a later statute repealing that above mentioned, whereby the existing remedy of suit against the

State was taken away and common-law remedies revived. McCullough *v.* Virginia, *supra*.

A statute subsequent to the issue of bonds prohibited mandamus or other process against individual officers of a city to enforce judgment, and also prohibited execution and substituted as the sole remedy a registration of the judgment, accompanied by a duty on the city officers to pay out of first available money. Held adequate remedy for enforcement of pre-existing debts and not unconstitutional, reserving power of court to compel city to provide money if it failed to do so in the next succeeding tax levy. Louisiana *v.* New Orleans, 102 U. S., 203.

Under pre-existing law of Louisiana minors, etc., had tacit mortgages on the property of their guardians and tutors. A subsequent act denied validity to such tacit mortgages unless registered, allowing less than a year for registration of existing ones. Held valid for the reason that it left an adequate remedy. Vance *v.* Vance, 108 U. S., 514, 518.

Law authorizing service of process on mayor or clerk may be changed to require service on the mayor without impairing obligation of prior contracts. Perkins *v.* Watertown, 5 Biss., 320.

46 Ch. 49, Laws of 1858, made fraud in procuring railroad farm mortgages or want of consideration an absolute defense in suit even by an innocent holder for value. Held to impair the obligation of the contract. Cornell *v.* Hichens, 11 Wis., 368.

Ch. 88, Laws of 1861, greatly modified the remedy upon farm mortgages to corporations. It required security for costs; deprived parties of trial before court, substituting a referee with extremely dilatory procedure before him; gave intermediate appeal on rulings as to evidence, with stay; extended the time for appeal four years with stay meanwhile, apparently without bond; provided that no title should be acquired on the sale under any judgment until that time for appeal expired; provided that such sale should be of no effect in case of reversal; denied the right to any deficiency judgment; denied plaintiff right of appeal until he had paid all costs; required suit on the note or bond alone to be in the county where the mortgaged premises were situated; declared that the plaintiff should be deemed to hold the security *prima facie* with full notice of all equities; stayed all sales under power of sale in the mortgage, in case misrepresentation or want of consideration were alleged, until such issue should be finally determined, and deprived the plaintiff of all other remedies except those specified in the chapter. This act was held to so burden the remedy as to impair the obligation of the contract. The court said that several of the detailed provisions, taken alone, as, for example, the requirement of security for costs, would not of themselves have that effect, but that the purpose of the act was so obviously to embarrass, restrict, and postpone the enforcement of these mortgages, according to their terms, that it must be held void. Oatman *v.* Bond, 15 Wis., 20.

A law authorizing the issue of certain city bonds required the levy of a tax to meet the same. A subsequent act prohibited the
47 city from raising any taxes except for each year's interest as it accrued. Held unconstitutional so far as it prohibited a tax

to meet judgments on previously defaulted interest. State *ex rel.* Soutter *v.* Madison, 15 Wis., 30.

Suspension of all process against volunteers "during service" held to impair the obligation of the contract, because it deprived the creditor of all remedy for an indefinite period—as the court said, "five, ten, or twenty years." Hasbrouck *v.* Shipman, 16 Wis., 296. The contrary has been held in other States where the suspension was not indefinite. McCormick *v.* Rusch, 15 Ia., 127; Breitenbach *v.* Bush, 44 Pa. St., 313; Clark *v.* Martin, 49 *id.*, 299.

Statute making order of publication proof of sufficiency of grounds therefor held not constitutional as applied to pre-existing void judgments. Nelson *v.* Rountree, 23 Wis., 367.

Statute giving subcontractor's lien limited by the amount of the owner's debt to the contractor changed to make owner liable without limit held to modify the obligation of existing contract between owner and building contractor, and therefore unconstitutional. Hall *v.* Banks, 79 Wis., 229.

Statute giving debtor power to vacate the lien of an execution or attachment by making assignment within ten days thereafter; impairs obligation of existing contracts and is unconstitutional. Second Ward Savings Bank *v.* Schranck, 97 Wis., 250; Peninsular L. & C. Works *v.* Union O. & L. Co., 100 Wis., 488; Eau Claire Bank *v.* Macauley, 101 Wis., 304.

Statute prohibiting sale, under power contained in a mortgage, for less than two-thirds of an appraisal and giving one year for redemption held to impair the obligation. Bronson *v.* Kinzie, 1 How. (U. S.), 311.

Law staying execution of a judgment or enforcement of a contract impairs the obligation. Barnitz *v.* Beverly, 163 U. S., 48 118, and cases there cited.

Laws requiring that negotiable coupons from existing State bonds must before receipt for taxes be accompanied by principal bond, and that their genuineness be established without expert evidence, held to impair obligation. Production of principal bond inconsistent with contracted negotiability of separate coupons; expert evidence only way to prove genuineness of printed coupons and its exclusion worked complete repudiation. Intent to repudiate the coupons was obvious, and above provisions only parts of general scheme. McGahey *v.* Virginia, 135 U. S., 685.

In the light of the general rules on the subject and the foregoing illustrations of their application, we turn to an examination of the changes in procedure for enforcement of claims not allowed by the council, accomplished by amendment of defendant's charter. Under the former law jurisdiction of the court could be invoked by service of summons, which, if accompanied by complaint, the city must answer within twenty days, except for extension of time in discretion of court. Defects in summons or service thereof could be waived by voluntary appearance. Mistakes in procedure whereby plaintiff failed of hearing on the merits usually worked only nonsuit and he might sue again, subject only to statute of limitations. In contrast with this procedure it is pointed out that under the

charter of 1891 the plaintiff, before invoking jurisdiction of any court, must file his claim with the city clerk and must await examination by the comptroller and action of the council disallowing it, which may postpone him sixty days instead of twenty. Further, in order to reach a judicial forum he must give security for costs in a form prescribed by law and with sufficient sureties; he must obtain approval of the sureties by the city attorney and comptroller. Practically, he must do this within twenty days, appellant contends, for if a new bond be rendered necessary by a disapproval
49 that must be filed within that period from the disallowance of the claim. No method for coercing the action of these officers is expressly provided. Appellant also suggests the possible absence of either, casual or intentional, as a contingency burdening a claimant's chances of reaching the court. Lastly and most urgently, counsel dwells on the asserted inability to correct any mistakes by amendment and on the fatal effect of any such mistakes, not only on the action, but upon the cause of action as well.

Some of these changes are too immaterial to require extended comment. Service of notice of appeal on the city clerk in lieu of service of summons on the mayor is so. Nor are we impressed with the importance of the asserted inability of a claimant to cure defects in procedure by amendment. It can hardly be said that there is any vested right to make mistakes. A variance of policy as to liberality in permitting amendment cannot be said to impair the obligation of any contract. A law permitting amendment of attachment affidavit has been held valid as to existing contracts and actions (Rosenthal *v.* Wehe, *supra*), why not the converse? The fact that a failure to obtain judgment by reason of errors in procedure or lack of proof, which in ordinary practice would result only in nonsuit, leaves claimant barred of his claims, no more affects the obligation than does a statute of limitations leaving reasonable time to sue, but expiring before the defectiveness of an attempted suit is discovered. It certainly comes no nearer such obligation than does an act taking away one's right to a second trial as of course after a judgment in ejectment (Sydnor *v.* Palmer, *supra*).

Perhaps the most cogent of appellant's objections to the new procedure is that there is a period of suspension of his right to sue resulting from the requirement that he must first present his claim to the council and await its disallowance. It is by no means certain that such obstacle is a new one. It has been
50 held that the statute, secs. 79 and 80, ch. 15, R. S. 1858, requiring claims to be presented to town boards of audit before they could be paid, impliedly prohibited suit until that had been done. Putnam *v.* Rubicon, 32 Wis., 498. That statute is not very obviously distinguishable from the requirements of the Oshkosh charter of 1883, either in the procedure indicated or the legislative purpose to be accomplished. It is not, however, necessary to decide upon their identity at this time. It will be observed that while unconstitutionality has been ascribed to legislation which directly postponed the ultimate acts for enforcement of a contract right, as by staying execution or creating or extending period of redemption

from judicial sales (Barnitz *v.* Beverly, *supra*), no case has been cited to us and none discovered where reasonable delay, resulting incidentally from the requirement of certain new steps in procedure or from enlargement of time for taking such steps, has been held fatal, provided such legislation did not clearly appear to be in bad faith and for the purpose of defeating or impairing the very obligations of the contract. On the other hand, such modifications of proceedings imposing either increased burdens or increased time have been recognized as legitimate exercise of legislative power over remedies and procedure. Von Baumbach *v.* Bade, *supra;* Starkweather *v.* Hawes, *supra;* Lee *v.* Buckheit, *supra;* Relyea *v.* Tomahawk Co., *supra;* Vance *v.* Vance, *supra;* Clark *v.* Martin, *supra.* In addition to these instances, it is worthy of note that very many such enactments have been enforced without challenge, some of them since very early days, thus adding the tacit consensus of legislature, courts, and the profession to a construction of the constitution which permits them. Among such may be noted the adoption, with reference to claims against counties, of the same policy as that with reference to cities now complained of, secs. 676, 682, and 683, R. S. 1898; the postponement of suits against towns until after presentation and consideration of
51 claim, sec. 824, R. S. 1898; the stay laws for purposes of reassessments, sec. 1210*b*, R. S. 1898; Plumer *v.* County Board, 46 Wis., 141, and many others. The requirement that before invoking judicial action the claimant must submit his claim to consideration of the common council is not a serious burden upon him. In practical affairs the instances are rare, if not unknown, that a claimant commences suit until he has first invited payment without suit. The effect of the charter of 1891 is to limit, not enlarge, the period necessary to constitute a demand and refusal of payment. In the matter of demands against municipalities the importance of momentary opportunity to sue is far less than with individual debtors, who during even a few days may by transfer of property or otherwise become execution-proof and thus defeat the purpose of an action.

The only remaining obstacle to judicial hearing and enforcement which appellant urges upon our attention is the requirement of a bond for costs in the sum of $150. This is in itself hardly a new burden, for our practice statutes have since long prior to 1883 subjected plaintiffs to a security for costs in the discretion of the court in still larger amount. Independently of this view, however, the absolute requirement that a plaintiff shall furnish reasonable security for costs as prerequisite to suit cannot be considered so completely a denial of adequate remedy as to impair the obligation of existing contracts. It is a very usual requirement of practice statutes and rules. If our statutes were changed so that such a preliminary were absolutely required by law for all suits, instead of being permissibly required by the court, as now, we apprehend there could be no doubt that such change is within the legitimate control of the legislature over procedure. Such is the suggestion in Oatman *v.* Bond, *supra;* but counsel urges that the bond is

not amendable and a mistake therein is fatal to the cause of action.

The answer to this suggestion is that no mistake need
52 be made. The charter, in terms easy of comprehension if carefully read, prescribes what the bond shall be, and compliance therewith is not difficult. A law which lays out a plain and adequate course for one to secure judicial enforcement of his contract does not impair the obligation because one straying out of the prescribed path cannot reach the goal. But again counsel says the statutory requirement that the bond be approved by the city attorney and comptroller renders it possible for those officers, either wilfully or by neglect, to exclude him from his remedy in court. Whether this be so has not yet been decided. If an appellant files a good and sufficient bond in compliance with law, it is by no means certain that the courts cannot coerce proper action of such city officers, at least so far as is possible without invading the field of their discretion. But it is not an impairment of the obligation of a contract to make the remedy dependent for certain steps upon the performance by public officers of their duties. The duty of the city attorney and comptroller to approve a proper bond is one cast on them by law, for breach of which one injured may have his remedy, as well as against the sheriff on whom he must depend for enforcement of an execution. All remedies depend upon performance of duty by public officers, and by breach thereof may fail. That is true even of the privilege of action in the courts wherein breach of duty by the judge might most effectually postpone or entirely defeat the claim, but such possibility does not render the remedy inadequate.

That the change of legislative policy as to procedure upon claims against Oshkosh and many other cities was adopted in the utmost good faith, with no legislative purpose other than promotion of public welfare and proper protection of public funds against unlawful demands, cannot be doubted. Putnam *v.* Rubicon, *supra:* See-

gar *v.* Ashland, 101 Wis., 515. It is the duty of the courts to
53 uphold and enforce such deliberately adopted and important changes of policy, unless it appears clearly and beyond all reasonable controversy that the legislative power has been exceeded. Adams *v.* Beloit, 105 Wis., 363, 373. After careful consideration of the changes wrought by the amendment of 1891 to the Oshkosh charter, we are unable to say with the requisite certainty that the legislature has transgressed the bounds to its authority over remedies and procedure by so modifying them as to relieve the city from any obligation resting upon it by reason of the contract with plaintiff, or to so diminish the remedy as to render those obligations substantially less valuable. We therefore are bound to enforce the law as it is written and affirm the decision of the trial court in sustaining the demurrer to the complaint.

By the COURT: Judgment affirmed.

54 And afterwards, to wit, on the thirteenth day of March, A. D. 1901, the following dissenting opinion by Justice Bar-

deen was filed in said cause in the words and figures following—that is to say:

55 OSHKOSH WATER WORKS COMPANY, Appellant,
vs.
CITY OF OSHKOSH, Respondent.

BARDEEN, *J.* (dissenting):

The obligation of a contract, in a constitutional sense, is the means provided by law by which it can be enforced. Whatever lessens the efficacy of this means or tends to postpone or retard the enforcement of the contract, impairs the obligation. State of Louisiana, &c., *v.* New Orleans, 12 Otto, 203; S. C., Lawyers' Co. Op. Ed. Book 26, p. 132, and note; vol. 9, Notes on U. S. Rep'ts, 1069; Baker's Ann. Cons. U. S., 68. The remedies afforded by existing laws enter into and form a part of the obligation of a contract. The legislature has a right to change such remedies and modify the laws governing procedure in court if it leaves the party a substantial remedy according to the course of justice as it existed at the time the contract was made. Sturges *v.* Crowninshield, 4 Wheat., 122. One of the tests that a contract has been impaired is that its value has by legislation been diminished. It is not a question of degree or manner or cause, but of incroaching in any respect on its obligation, dispensing with any part of its force. Planters' Bank *v.* Sharp, 6 How., 301. The substantial question in this case is whether the new charter so affects the remedy as to impair the obligation of plaintiff's contract and render it less valuable. I cannot persuade myself that it does not. The conditions and restrictions thrown around the attempt to get into court are so complex and indefinite, and are to be followed with such nicety of exactness at the peril of losing the remedy entirely, and are so completely different from those in existence when the contract was made, that in my opinion they so lessen the efficacy of the remedy, retard its enforcement, and
56 diminish its value as to come within the condemnation of the Constitution. I refer particularly to those charter provisions relating to the time when an appeal must be taken commences to run, and the requirements relating to the giving and approval of a bond. The latter provisions seem to me to be of especial significance. The appellant must take its appeal, get its bond, and secure the approval both of the city attorney and city comptroller in twenty days or its rights are forfeited. The charter contains no provisions regarding the responsibility of the sureties, does not say what the appellant must do to satisfy the city attorney and comptroller as to the sufficiency of the bond, but leaves it entirely to those officers to approve or not, at will. If perchance one of those officers should be absent from the city during the time the right to appeal is running, the appeal is lost. The old charter contained no such technical or drastic conditions. There are several other changes which, to my mind, tend to lessen the value of the contract and to postpone and retard its enforcement, but I need not mention them at length. The impression in this regard is so strong that I cannot agree with the conclusion of the majority of the court.

57 OSHKOSH WATER WORKS COMPANY, Plaintiff in Error,
vs.
CITY OF OSHKOSH, Defendant in Error.

I, Clarence Kellogg, clerk of the supreme court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of all the record and proceedings now on file and of record in my office, with all things concerning the same, in the above-entitled cause.

That the original writ of error, the petition therefor, the citation, with its service endorsed thereon; the assignment of errors, and a copy of the bond are appended to the return herein, and that they are all returned to the Supreme Court of the United States in obedience to the command of the writ of error hereto annexed.

Seal Supreme Court of Wisconsin.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Madison, this thirtieth day of March, A. D. 1901.

CLARENCE KELLOGG,
Clerk of Supreme Court, Wisconsin.

Endorsed on cover: File No., 18,101. Wisconsin supreme court. Term No., 288. The Oshkosh Water Works Company, plaintiff in error, *vs.* The City of Oshkosh. Filed April 3rd, 1901.

No. 288,
Brf. of Hooper for P. C.

Office Supreme Court U.S.
FILED
FEB 15 1902
JAMES H. McKENNEY,
Clerk.

Filed Feb. 15, 1902.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1901.

No: 288.

THE OSHKOSH WATER WORKS COMPANY,

PLAINTIFF IN ERROR,

vs.

CITY OF OSHKOSH, DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1901.

No. 288.

THE OSHKOSH WATER WORKS COMPANY,
PLAINTIFF IN ERROR,

vs.

CITY OF OSHKOSH, DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR.

ACTION.

By ordinary summons and complaint. (Record, p. 9-12.)

COMPLAINT.

First cause of action. For hydrant rental for third quarter of 1898 on contract made June 18, 1883, by which plaintiff agreed to erect water-works and supply fire hydrants for thirty years, at specified rental payable quarterly. (Record p. 9, 10, 11.)

Second cause of Action. For hydrant rental for third quarter of 1898, on contract made October 31, 1891, by which plaintiff agreed to extend mains and supply certain other fire hydrants at specified rental, payable quarterly. (Record pp. 11, 12.)

DEMURRER TO COMPLAINT.

That it does not state facts sufficient to constitute a cause of action. (Record p. 13.)

Order sustaining demurrer. (Record p. 14.)

Judgment on demurrer dismissing complaint. (Record p. 14, 15.)

Appeal to Supreme Court of Wisconsin. (Record, pp. 7-8.)

Judgment affirmed (Record p. 16) on ground that the action was prohibited by the new charter of the city, chap. 59, Laws of Wisconsin for 1891. (Record pp. 16 to 28. Appendix p. 4.)

By the *former charter* (Chap. 183, Laws of 1883, published April 10, 1883) which was in force at the time of the contract for building works and laying mains, the remedy of plaintiff for breach of contract to pay hydrant rental was an ordinary action commenced by service of summons. (Appendix pp. 1, 2.) Opinion of the Supreme Court of Wisconsin herein. (Record pp. 17 to 28.)

New Charter of 1891 (Note 1) prohibits the claimant from bringing any direct action on the claim, as was his right under the charter existing at the time of the contract, but provides that the claim be as Justice Lyons says, "*filtered through the common council.*" (Note 2.)

It relates not to any general change in practice but only to proceedings against this city.

ERRORS.

The Court erred.

First. In concluding, as a matter of law, that the charter of 1891 did not, so far as it relates to contract of June 18th, 1883, impair the obligation thereof.

Second. In concluding, as a matter of law, that the contract of October 31st, 1891, for extension of the mains was not unconstitutionally impaired by the charter of 1891.

NOTE 1—Sections 4, 5 and 6, sub-chap. 21, sec. 1, 5 and 6, sub. chap. 9 of chap. 5; Laws of 1891. See Appendix pp. 3, 4.

NOTE 2—Shields vs. Appleton, 49 Wis., 125 at 127.

ARGUMENT.

NEW REMEDY SHOULD BE "SUBSTANTIALLY EQUIVALENT"

It is well settled that legislation simply modifying the remedy does not "impair the obligation of the contract;" but where the subsequent legislation limits to a remedy not "substantially equivalent" then it does "impair the obligation of the contract" within the meaning of the constitution of the United States. (Note 3.)

How far remedy may be modified.

In Oatman vs. Bond (p. 28) "That the parties have a substantial remedy according to the course of justice as it existed at the time the contract was made."

In Edwards vs. Kearzey (p. 607) "Substantially to impair and lessen the value of the contract is forbidden by the Constitution." Quoted and approved in many cases in the Supreme Court of the United States and in the State Supreme Courts.

In Green vs. Biddle (p. 76) "If the remedy afforded be qualified and restrained by conditions of any kind * * * the right of the owner * * * is impaired and rendered insecure according to the nature and extent of such restrictions." Approved in Bronson vs. Kinzie.

NOTE 3—Catman vs. Bond, 15 Wis., 20, 25-6-7; Hasbrouck vs. Shipman, 16 Wis., 315, 396; Nelson vs. Rountree, 23 Wis., 367, 371; Green vs. Biddle, 21 U. S., 15; Bronson vs. Kinzie, 42 U. S. 311, 317; McCracken vs. Hayward, 43 U. S., 608, 612; Howard vs. Bugby, 65 U. S., 461; Walker vs. Whitehead, 83 U. S. 314, 318; Tennessee vs. Sneed, 96 U. S., 69; Edwards vs. Kearzey, 96 U. S., 595, 607; Brine vs. Ins. Co. 96 U. S., 627, 637; Seibert vs. Lewis, 122 U. S., 284, 295, McGahey vs. Virginia, 135 U. S., 662; Barnitz vs. Beverly, 163 U. S., 118, 123; Shapleigh vs. San Angelo, 167 U. S., 640, 657.

In Louisiana vs. New Orleans (p. 207) "Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened." Approved in Siebert vs. Lewis.

In Siebert vs. Lewis (pp. 295, 299) "Legal equivalent."

In Bronson vs. Kinzie (p. 316) "Provided the alteration does not impair the obligation of the contract." Approved in Barnitz vs. Beverley.

In Bryan vs. Insurance Company (p. 637) "No changes in these laws which seriously interfere with that enforcement are valid."

In Walker vs. Whitehead (p. 318) "Any impairment of the obligation of a contract—the degree of impairment is immaterial—is within the prohibition of the Constitution * * * It must be left with the same force and effect, including the substantial means of enforcement, which existed when it was made."

Is the New Remedy a "Legal Equivalent?"

It remains to inquire wherein and how far this new charter impairs recovery upon the contract or lessens its value; whether or not the substituted remedy is a "legal equivalent" or substantially equivalent.

General Practice.

By the *practice in Wisconsin* actions are easily commenced by the service of summons; and process and pleadings are amendable at all stages of proceedings. (Note 4.) All immaterial errors and variances are disregarded at all stages. (Note 5.)

Note 4—R. S. 1898, secs. 2669, 2670, 2830. See Appendix pp. 5, 6.

Note 5—R. S. 1898, secs. 2669, 2670, 2829. See Appendix pp. 5, 6.

In case there is failure to secure adjudication upon the merits the judgment is no bar to a future action within the period of limitation; in this case six years. The uniform policy is to secure adjudication upon the merits.

This is now the nature of ordinary legal remedies in Wisconsin. It was the nature of plaintiff's remedy when it contracted to build these works and supply these hydrants, and invested its capital in that enterprise.

NEW FILTERING PROCESS.

But *under the new charter* the claimant is forbidden to sue the city. It is directed to present its claim to the common council for allowance, and, in the language of Mr. Justice Lyon "it requires that the claim must, so to speak, be filtered through the common council." (Notes 1 and 2.)

When we attempt the filtering process we are met with an entirely different policy from that relating to ordinary actions. It is held, under this and parallel legislation, that the Court can only get jurisdiction of a claim against a city by exact compliance with all the minute details of the filtering process; that the Court of general common law jurisdiction of the State has no original jurisdiction of the subject matter of claims against cities; that such jurisdiction can only come to it as an appellate court, and then only upon exact compliance with all the details of a tortuous filtering process through the common council; that the Court wherein the actual trial of the contention can first be had acts only as a Court of review, or, in other words, that the only body having original jurisdiction of the subject matter of contentions against a city is the common council of the city. (6)

NOTE 6—Telford vs. Ashland, 100 Wis., 238-9-40; Plano Mfg. Co. vs. Rasey, 69 Wis., 246; Mason vs. Ashland, 98 Wis., 540; Gutta Percha Co. vs. Ashland, 100 Wis., 232, 236-7; Water Works Co. vs. Oshkosh 106 Wis. 83.

Therein, of course, no trial can be had, for it is fundamental that no one can adjudge his own contentions.

Burdens on the Claimants.

The Supreme Court of Wisconsin has held that under this "filtering process" there can be no amendment of the bond, and no new bond (7); that failure to appeal in time forfeits the claim (8); and that no objection for non-compliance with every step of the filtering process can be waived or even cured by proceeding to trial of the appeal upon the merits. (9) That after the 60 days non-action period, the common council cannot reconsider the claim. That it is already wiped out by non-action and failure to appeal from non-action. (10)

Non-Action Period.

Under this charter, non-action for 60 days is equivalent to adverse action, but the time when the period of non-action begins to run is very doubtful, and the doubt must be correctly solved at peril of losing the claim. The charter provides: (section 4, sub-chapter 21.) "That the failure of such common council to pass upon such claim within 60 days after the presentation of such claim shall be deemed a disallowance thereof."

But, when is the "presentation of such claim?" By section 1, sub-chapter 9, it is provided that the claim shall be

---

Note 7—Drinkwine vs. Eau Claire, 83 Wis., 428-9-30. Water Works Company vs. Oshkosh 106, Wis. 83.

Note 8—Mason vs. Ashland, 98 Wis., 540; Telford vs. Ashland, 100 Wis., 238; Water Works Company vs. Oshkosh 106, Wis. 83.

Note 9—Telford vs. Ashland, 100 Wis., 238-9-40. Overruling Sheel vs. Appleton, 49 Wis., 125 at 127.

Note 10—Seegar vs. Ashland, 101 Wis. 515.

"filed with the city clerk, who shall endorse thereon * * * and within one week deliver the same to the comptroller for examination." This section further provides that the comptroller shall examine the claim and determine whether it is properly itemized and verified, and if the charges are correct and incurred by the proper authority and "generally determine the correctness of such claim;" and that for this purpose "he shall have the power to swear witnesses and take testimony." After examination, he approves or disapproves in whole or in part, and reports his reasons therefore, and the evidence taken by him to the city clerk to whom the claim is returned to be placed before the council for its action.

This section further provides that "No claim shall be considered by the council, or reported to the committee, until it shall have been examined and reported on by the comptroller;" that the comptroller, having examined the claim and reported thereon to the clerk, "the city clerk shall thereupon place such claims or demands before the proper board or common council as shown by the nature of the claim at the next meeting of such board or common council for allowance." (Appendix pp. 3, 4.)

Under this charter, it seems quite uncertain, until judicial decision, when is "presentation of such claim." Is it when it is "filed with the city clerk," to be by him handed to the comptroller for his action; or when it is returned by the comptroller to the clerk to be by him placed before the council for allowance; or when, after having been acted upon by the comptroller and returned to the clerk, it is by clerk "placed before such board or common council for allowance" under section 1, sub-chapter 9. (Appendix, pp. 3, 4.)

To save the claim, appeal must be taken within twenty days succeeding the sixty days non-action period. If the claimant dates the commencement of the non-action period

at either of these times and appeals accordingly, and the Court does not agree with him, his claim is lost, wiped out. (Oshkosh Water Works Co. vs. Oshkosh.)

APPROVAL OF BOND.

There are twenty days after disallowance, (sec. 6, sub-chap. 21, appendix pp. 4, 5) or expiration of sixty days non-action, (sec. 4, sub-chap. 21, appendix p. 4) in which to appeal. To perfect appeal, as a necessary part of the filtering process, bond for costs must be given "with two sureties to be approved by the city attorney and comptroller." (Sec. 6, sub-chap. 21 Appendix p. 4.) The perfection of this bond, including of course, its approval by the city attorney and comptroller, is necessary to the jurisdiction of the Court. So all the Wisconsin cases hold. Any failure herein, and the claim is lost. Approval of the bond stands on the discretion of the city attorney and comptroller. Under what compulsion do they act? Can a Court substitute its discretion in place of theirs and compel them to approve? Within what time can such action be taken? What protection in case of their absence, or the absence of either of them, from the city? Is ten days a long time for the city attorney to be on a fishing trip, and ten other days a long time for the comptroller? Is twenty days a long time for the sojourn of these officers, or one of them, beyond the jurisdiction of the Court? What protection against their non-action or their caprice or other misbehaviour?

The plaintiff complains that this charter puts it in the power of these hired men, appointed by the common council (appendix p. 2), and subject to removal by the common council (appendix p. 3), to defeat the attempt of any claimant to get a hearing in Court.

Supreme Court of Wisconsin answers this complaint thus:

"But again counsel says, the statutory requirement that the bond be approved by the City Attorney and Comptroller renders it possible for those officers either wilfully or by neglect to exclude him from his remedy in Court. *Whether this be so has not yet been decided.* If the appellant files a good and sufficient bond in compliance with law, it is by no means certain that the Courts cannot coerce proper action of such city officers, at least so far as is possible without invading the field of their discretion."

But what is a "good and sufficient bond?" Is not that, so far as relates to sufficiency of surety, entirely in the discretion of the City Attorney and Comptroller?

Is there remedy in damages against misbehaving officers? What security is there for payment? What probability that misbehavior will not be condoned as discretion? What are the certain ear-marks of discretion as distinguished from misbehavior?

Bond Signed by City Officer not Good.

There are in this small city 70 to 100 officers. The position of many of them is honorary. Salary one dollar per year. Charter says, "No city officer shall be accepted as surety on any bond * * * made to the city." (Appendix p. 5.) Hence no one of these officers can be a surety on an appeal bond. This fact alone is of little moment. But suppose a bond on appeal signed by one of these officers is approved by the city attorney and comptroller. The claimant supposes his appeal perfected. On discovery of this fact must not the appeal fail and the claim be lost?

As the Wisconsin Supreme Court says herein, "We have held that the preliminary steps are jurisdictional; and that unless complied with the Court fails to acquire jurisdiction of the subject matter; that the various steps are mandatory and cannot be waived by the officers of the city; nor can jurisdiction be conferred by such officers; Telford vs. Ash-

land, 100 Wis., 238; Oshkosh Water Works Company vs. Oshkosh, 106 Wis., 83; that the bond cannot be amended, nor a new bond given, after the expiration of the twenty days. Oshkosh Water Works Company vs. Oshkosh." (Record p. 18)

FORM OF BOND.

Oshkosh is in the Winnebago circuit and on appeal from the common council of that city the case goes to that circuit and to perfect the appeal a bond must be given "conditioned for the faithful prosecution of such appeal, and the payment of all costs that shall be adjudged against the appellant in the Circuit Court." (Sec. 6, sub-chapter 21, appendix p. 5.) If the bond recites "Winnebago Circuit Court" instead of "Circuit Court," the appeal fails—there can be no amendment, no new bond—the claim is lost. (11) The approval of the form of the bond by the city attorney, the law officer of the city cannot be adverted to in support of a bond defective in form. (12)

In place of a known, tried, action at law, with liberal rules for amendment, and waiver, and disregard of defects, and right to a new action within period of limitation, under the charter in existence at the time of the contract, we have under the new charter a tortuous filtering process through a mesh of intricacies, wherein any misconstruction of doubtful statutory rules, or misstep of the party, or non-action, or perverse action of officials, is fatal to the claim; and where there can be no amendment, no waiver, no disregard of defects, no estoppel even by trial.

NOTE 11—Drinkwine vs. Eau Claire, 83 Wis., 428-9-30; Stephani vs. Manitowoc, 101 Wis., 59, 64; Water Works Co. vs. Oshkosh, 106, Wis. 83.

NOTE 12—Water Works Co. vs Oshkosh 106, Wis. 83.

This and similar charters have given rise to so much litigation, involving so many new and intricate questions, as to make demand for a new local law book, "Estabrook's Law of Cities."

Where public opinion is inflamed against a corporation, with large capital invested in water works or lighting works, is not the process of filtering a claim through the common council under this charter, in view of these decisions, a very precarious remedy? Is it "substantially equivalent" to the the simple common law action by summons?

ADVANTAGE OF SIMPLICITY.

Mr. Justice Hunt says in Tennessee vs. Sneed (p. 75):

"This remedy is simple and effective. A suit at law to recover money unlawfully exacted is as speedy and easily tried, and less complicated than a proceeding by mandamus. Every attorney knows how to carry on the former, while many would be embarrassed by the forms of the latter."

Mr. Justice Bardeen, dissenting herein, said:

"The conditions and restrictions thrown around the attempt to get into court are so complex and indefinite, and are to be followed with such nicety of exactness, at the peril of losing the remedy entirely, and are so completely different from those in existence when the contract was made, that in my opinion they so lessen the efficacy of the remedy, retard its enforcement, and diminish its value as to come within the condemnation of the constitution. I refer particularly to those charter provisions relating to the time when an appeal must be taken, commences to run, and the requirements relating to the giving and approval of a bond. The latter provisions seem to be of especial significance. The appellant must take its appeal, get its bond, and secure the approval both of the city attorney and city comptroller in 20 days or its rights are forfeited. The

COPY BOUND CLOSE IN CENTER

charter contains no provisions regarding the responsibility of the sureties, does not say what the appellant must do to satisfy the city attorney and comptroller as to the sufficiency of the bond, but leaves it entirely to those officers to approve or not, at will. If, perchance, one of these officers should be absent from the city during the time the right to appeal is running the appeal is lost." (Record p. 28.)

II.

DELAY.

Under charter of 1883, suit could be commenced immediately on demand. Under charter of 1891 if Common Council choose not to take action, no proceeding can be instituted in Court until 60 days non-action, whenever that may be. Then the claimant may appeal. Then the clerk must make a return of the appeal to the Court, but there is no provision as to when he shall make such return (Sec. 6, sub-chap. 21, appendix pp. 4 5.)

After he makes his return there is, on the part of the claimant, only an account, and on the part of the municipality, only a refusal to pay. This does not make an issue for trial in Court. The Court must direct an issue to be made up.

Certainly a claimant would be fortunate if he procured an issue to be made up in a year after handing his claim to the clerk of the city. This is a special law suspending action for 60 days and thereafter indefinitely, on these claims against this defendant city. As to this existing contract it is unconstitutional for that reason. (13)

NOTE 13—96 U. S., 69.

III.

WITHDRAWAL OF PROPERTY FROM EXECUTION

Under this and similar charters no suit can be maintained upon an allowance. (13) Hence no execution can be had, and no levy upon, or sale of, the property of the municipality. It is all withdrawn from execution as completely as if declared exempt. Under the charter of 1883 judgment could be rendered on non-payment, and execution could be had on which all the property of the city, not especially declared exempt-(appendix p. 1) could be seized and sold. (14) Such withdrawal of property from reach of execution, or denial of right to execution, renders the charter of 1891 void as to then existing contracts. (13)

Object of Change.

As was said by Mr. Justice Shiras in Barnitz vs. Beverly, p. 131. "We are bound to consider the entire scheme of the new statute and to have regard to its probable effect on the rights of the parties."

Mr. Justice Dodge says (Record p. 18.) "This amendment of the charter of Oshkosh was but one of many such amendments to city charters occuring at about that time significant of a marked change of legislative policy with reference to enforcement of money demands against cities."

Respecting the object of this "marked change of legislative policy" Mr. Justice Dodge says in Seegar vs. Ashland (518.) "The legislature has deemed it necessary to throw these burdens on the claimants and restrictions upon the municipal officers in order to protect the public moneys of the municipality."

Protect from what? Evidently from the hand of the Court acting in behalf of the creditor.

Note 14—Secs. 19, 23, 28, 29, 30, sub-ch. 14, chapter 183, laws 1883. Appendix pp. 1, 2. Rev. Stat. 1898, 2982, sub. 16, appendix p. 6.

Burdens thrown upon claimants to protect the public moneys of the municipality from attack through the courts, can hardly be said to be imposed for reformation in practice. This legislation is directed principally against claims arising out of contracts of municipalities with Water Works Companies and Lighting Companies. Most, if not all, of the corporate charters contain provisions for purchase of the plants by the municipality in order to municipal ownership. These facts of current history explain the reason why "the legislature has deemed it necessary to throw these burdens upon the claimantsst * * * in order to protect the public moneys."

The Supreme Court of Wisconsin says this is "a marked change in legislative policy with reference to enforcement of money demands against cities." Adopted in order "to throw these burdens on the claimant."

The same court formerly said that the parties must "have a substantial remedy according to the course of justice as it existed at the time the contract was made." (Ante p. 3.)

This court says "If the remedy afforded be qualified and restrained by conditions of any kind * * * the right of the owner * * * is impaired and rendered insecure according to the nature and extent of such restrictions." (Ante p. 3.)

"No changes in these laws which seriously interfere with that enforcement are valid." (Ante p. 4.)

"Any impairment of the obligation of a contract—the degree of impairment is immaterial—is within the prohibition of the constitution * * * It must be left with the same force and effect including the substantial means of enforcement which existed when it was made." (Ante p. 4.)

MOSES HOOPER,

for Plaintiff in Error.

APPENDIX.

Charter of 1883.

In this case the Supreme Court of Wisconsin says:

"At the time of making the contract of June 18, 1883, the city of Oshkosh existed and operated under a charter known as chapter 183 of P. and L. Laws of 1883, the first section of which constituted it 'a municipal corporation by the name of the city of Oshkosh, and by that name capable of suing and being sued in all courts of law and equity.' That charter, sec. 1, ch. VII, provided that moneys 'shall be drawn out only upon the order of the mayor and city clerk, duly authorized by vote of the common council,' and by sec. 10, ch. VII., 'Any account or demand against the city before acted upon or paid, the council may require the same to be verified by affidavit, except salaries and amounts previously fixed or determined by law.' Except for these restrictions upon the payment of money, the city of Oshkosh was subject to suits upon contract liability like any other person or corporation." (Record, p. 17.)

This charter also contains the following provisions:

Sub. Chapter XIV, section 19.

"No real or personal property of any inhabitant of said city, or of any individual or corporation, shall be levied on and sold by virtue of any execution issued to satisfy or collect any debt, obligation or contract of said city."

Section 23. "The said city may lease, purchase and hold real or personal estate sufficient for the convenience of the inhabitants thereof, and may sell and convey the same, and they shall be free from taxation while owned by the city."

Section 28. "When the city of Oshkosh deeds or leases any real estate or any interest therein, owned by said city, the party of the first part shall be the city of Oshkosh, and

the person or persons authorized to execute such deed or lease need not be named in the body thereof."

Section 29. "The mayor of said city is hereby authorized, when the common council shall, by ordinance or resolution, for that purpose, describing the real estate and interest to be conveyed, order and direct him so to do, to execute a deed or lease of such real estate, or interest therein belonging to the said city; the said deed or lease shall be signed by the mayor of said city and countersigned by the city clerk, and sealed with the corporate seal of said city, and duly witnessed and acknowledged, as is provided by law for the execution of deeds and leases."

Section 30. "When any such deed or lease is so executed, the city clerk shall attach to such deed or lease a true and attested copy of such ordinance or resolution, and the same shall be recorded by the register of deeds with the said deed or lease, and such copy, so attached and recorded shall be, in all courts of this state, *prima facie* evidence of the authority of such mayor to make and execute such deed or lease."

NEW CHARTER OF 1891.

In 1891 there was enacted a revised charter for the city of Oshkosh, being chapter 59 of the laws of 1891. This charter contains substantially the provisions of section 1 of sub. chapter 1 and sections 1 and 10 of sub. chapter 7 of the charter of 1883. Among other things this charter also contains the following enactments.

Sub. Chapter IV, section 9:

"At the first meeting of the common council or as soon thereafter as may be, there shall be the following city officers appointed by the mayor and confirmed by a majority of all the members of the common council voting in favor of such confirmation: a comptroller, a city attorney, a chief of police and a chief of the fire department, who shall hold their offices for the term of two years." * * *

Section 18. "Every officer elected or appointed to any office may be removed from such office by a vote of two-thirds of all the members of the common council; but no such officer shall be removed except for cause nor unless written charges are preferred against him and an opportunity given him to be heard in his own defense." * * *

Sub. Chapter IX, section 1.

"All claims and demands against the city except for salaries shall be itemized, verified by oath of the claimant or some one in his behalf, and filed with the city clerk, who shall endorse thereon the name of claimant, amount and nature of claim, date of filing and proper number of claim, and within one week deliver the same to the comptroller for examination, who shall examine such claims presented against the city and so delivered to him, whether founded on contract or otherwise, and determine as to each claim whether the same is properly itemized and sworn to, or if on contract, whether the items charged are correct, whether such claim was incurred by proper authority, and generally determine the correctness of such claim. For the above purposes he shall have power to swear witnesses and take testimony. If he does not find any objection to the claim, he shall mark his approval thereon; if he disapproves, or approves in part and disapproves in part, he shall report his reasons therefor, and in all cases he shall report the evidence taken by him. No claim shall be considered by the council or reported to a committee till it shall have been examined and reported on by the comptroller. The comptroller shall so examine said claims and demands and return the same to the city clerk within two weeks after he shall have received them with his report thereon in writing. The city clerk shall thereupon place such claims or demands before the proper board or common council, as shown by the nature of the claim at the next meeting of such board or common

council for allowance; if a claim arising on account of the public parks, before the board of public works; if a claim arising on account of the schools, other than the erection and repair of school buildings and maintenance of school grounds, before the board of education; and all other claims before the common council."

Section 5. "Whenever any claim shall have been disallowed in whole or in part by the comptroller, the claimant may appeal from such action of the comptroller to the common council."

Section 6. "When the common council shall have taken final action upon any claim or demand and shall have disallowed any portion thereof, the claimant may appeal from such action in the manner provided in this act."

Sub. Chapter 21, section 4.

"No action shall be maintained by any person against the city upon any claim or demand until such person first shall have presented his claim or demand to the common council for allowance, and the same shall have been disallowed in whole or in part; provided, that the failure of such common council to pass upon such claim within sixty days after the presentation of such claim shall be deemed a disallowance thereof."

Section 5. "The determination of the common council disallowing in whole or in part any claim shall be final and conclusive, and a bar to any action in any court founded on such claim, unless an appeal be taken from the decision of such common council as in this act provided."

Section 6. "Whenever any claim against the city shall be disallowed in whole or in part by the common council, such person may appeal from the decision of such common council disallowing said claim to the circuit court of the county in which the city is situated, by causing a written notice of such appeal to be served on the clerk of the city

within twenty days after making of the decision disallowing such claim; and by executing a bond to the city in the sum of one hundred and fifty dollars, with two sureties to be approved by the city attorney and comptroller, conditioned for the faithful prosecution of such appeal and the payment of all costs that shall be adjudged against the appellant in the circuit court. The clerk, in case such appeal is taken, shall make a brief statement of the proceedings had in the case before the common council with its decision thereon and shall transmit the same, together with all the papers in the case to the clerk of the circuit court of the county. Such case shall be entered, tried and determined in the same manner as cases originally commenced in said court."

Chapter XXIII, sec. 5 provides that "no city officer shall be accepted as surety on any bond, contract or other obligation made to the city."

Secs. 1, 2, 3, 4, 5, 6, 9, sub. ch. IV, sec. 1, sub. ch. X, XI, XII, XIII and XV provide for, in all from seventy to one hundred officers in this little city, many with salary of one dollar per year. Such as school commissioners, park commissioners and cemetery commissioners.

Practice Acts.

Revised Statutes for Wisconsin, for the year '98 contains the following provisions:

Section 2669. "No variance between the allegation in a pleading and the proof shall be deemed material unless it shall actually mislead the adverse party to his prejudice in maintaining his action or defense upon its merits. Whenever it shall be alleged that a party has been so misled that fact shall be proved to the satisfaction of the court, and in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as may be just." Same as sec. 33, ch. 125, R. S. 1858.

Section 2670. "When the variance is not material, as provided in the last section, the court may direct the fact to be found in accordance with the evidence or may order an amendment without costs." Substantially same as sec. 34, ch. 125, R. S. 1858.

Section 2829. "The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Same as sec. 40, ch. 125, R. S. 1858.

Section 2830. "The court may, upon the trial or at any other stage of the action, before or after judgment, in furtherance of justice and upon such terms as may be just, amend any process, pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. * * *" Substantially same as sec. 37, ch 125, R. S. 1858.

EXEMPTION FROM EXECUTION.

Section 2982. Sub. 16, R. S. 1898 specifies what property of a municipal corporation shall be exempt from execution and is substantially same as sec. 1, ch. 89, laws 1858.

Revised Statutes of Wisconsin, 1878, section 2982, sub. 16, exempts from execution the following property: "All fire-engines, apparatus and equipments, including hose, hose-carts and hooks and ladders, belonging to, or which may hereafter belong to, any town, city or village in this State, and which are or may be kept and used for the protection of property in such town, city or village from fire, together with the engine-houses and hook-and-ladder houses for the protection of the same, and the lot or lots on which such engine and hook-and-ladder houses may be situated, when owned by any such town, city, or village; and any lot or lots owned, used and occupied by any such town, city, or village, for corporate purposes."

No. 75.

Office Supreme Court U.S.
FILED
NOV 14 1902
JAMES H. McKENNEY,
Clerk.

Sup. Ct. Br. of Hooper for P. C.

SUPREME COURT OF THE UNITED STATES.

Filed Nov. 14, 1902.

OCTOBER TERM, 1902.

No. 75.

THE OSHKOSH WATER WORKS COMPANY,

PLAINTIFF IN ERROR,

vs.

CITY OF OSHKOSH, DEFENDANT IN ERROR.

MEMORANDA IN BEHALF OF PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902. No. 75.

THE OSHKOSH WATER WORKS COMPANY,
PLAINTIFF IN ERROR,

vs.

CITY OF OSHKOSH, DEFENDANT IN ERROR.

MEMORANDA ON PRESENTATION OF CLAIM.

I.

STATEMENT OF PRESENTATION SUFFICIENT.

Plaintiff intended to allege presentation of claim to common council for allowance, and to that end, alleged, "That on the 1st day of October, 1898, this plaintiff duly demanded of this defendant payment * * * of said sums. * * * That no part of same has ever been paid." The only object plaintiff could have had in making this allegation was to state, in another form, presentation of the claim for allowance and payment. In no other way could demand be made upon the defendant. The statement "duly demanded" could have no other proper object then to show presentation of claim.

The rule in Wisconsin is that the pleading is to be construed as the party making it evidently understood it. (Note 1)

In Spence vs. Spence, Chief Justice Dixon said (page 469, 455,) that the words "express understanding" were intended by the pleader as equivalent to "express contract" or "express agreement," He further said, "Such was the

NOTE 1. Spence vs. Spence, 17 Wis., 462 (448) at 469 (455); Flanders vs. McVicker, 7 Wis., 372, 377-8; Horton vs. Horton, 66 Wis., 32.

undoubted intention of the pleader; and when the language fairly admits it, it is to be construed in the sense in which it was employed by him."

In Flanders vs. McVicker, Justice Cole said (page 377):

"It does not admit of a doubt but that there is a technical defect in the reply of the appellant * * * This is certainly defective pleading, and the question is how it is to be taken advantage of under the code." (378) "In the present case we think the substance of the reply good and sufficient, but that the manner in which the allegations are made is quite defective. But still the objection is not to the substance but to the form of pleading. * * * It is very evident that this was the object of the pleader who drew the reply, although he framed the allegation in a very inartistic manner. If, however, the respondents had any doubt as to the allegations of the reply * * * they could have moved the court to require the pleadings to be made more definite and certain."

In Roe vs, Lincoln Co. Justice Orton says (page 70):

"However inartificially the facts may be presented by the complaint, or however defective, uncertain or redundant may be the mode of their statement, if a good cause of action can be gathered from it by liberal interpretation, a demurrer to it will not be sustained." (Note 2.)

In Miller vs. Bayer, Justice Marshall says (pages 125-6): "We are not called upon to determine whether the plaintiff used the most appropriate language in stating her case, but whether the language used will permit of a construction which will sustain the pleadings."

In Morse vs. Gilman, Chief Justice Dixon says (page 534 (507-8) "It is saic to be a general rule, that a complaint to be overthrown by a demurrer or objection to evidence,

---

NOTE 2. Roe vs. Lincoln Co., 56 Wis., 66, 70;
Miller vs. Bayer, 94 Wis., 123, 125-6;
Morse vs. Gilman, 16 Wis., 531 (504) at 534 (507-8)

must be wholly insufficient. If in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if a good cause of action can be gathered from it, it will stand however inartificially these facts may be presented or however defective, uncertain or redundant may be the mode of their statement. Contrary to the common law rule every reasonable intendment and presumption is to be made in favor of the pleadings, and it will not be set aside on demurrer unless it be so fatally defective, that, taking all the facts to be admitted, the court can say they furnish no cause of action whatever."

It has been repeatedly held that an allegation of "due notice" or "duly notified" or "duly gave notice" is a sufficient allegation of notice given by the proper party to the proper party or officer in due season, at proper place, in writing (if written notice were necessary), and that the notice contained the proper matter. (Note 3).

It has been repeatedly held that an allegetion that payment was "duly demanded" or that a note was "duly presented" is sufficient allegation of a demand to be made at a particular time, or place, or in a particular manner, or of the presentation of a note for payment which should be presented to a particular person, at a particular place or time. (Note 4).

An allegation that an execution was "duly issued" in case where an order of court was necessary, implies the making of the necessary order. (Note 5).

NOTE 3. Pine Valley vs. Unity, 40 Wis., 680, 682-3;
Kusterer vs. Beaver Dam, 52 Wis., 146, 149;
Arzbacher vs. Mayer, 53 Wis., 380, 386;
Nelson vs. Boom Co., 52 Wis., 647.

NOTE 4. Bank vs. Countryman, 11 Wis., 398, 399;
Cutler vs. Ainsworth, 21 Wis., 381-2;
Willis vs. Crilley, 46 Wis., 577, 579-80.

NOTE 5. Jones vs. Davis, 22 Wis., 403;
Cornell vs. Radway, 22 Wis., 251.

If the defendant desired specific information as to how demand was made, or what was done, in order to prepare for answer, his remedy was not by demurrer but by motion to make more definite and certain. (Note 6).

It is evident that both counsel for plaintiff and counsel for defendant construed this allegation "duly demanded" as an allegation that the claim had been properly presented to the common council. There is nothing in the argument of defendant's counsel to the contrary. It is also plain that the Winnebago County Circuit Court and the Supreme Court of the State of Wisconsin so understood the allegation. Both of those courts proceed upon the view that the particular qnestion, the constitutionality of the Wisconsin act, was in issue, and that that was the only issue on the demurrer. The order sustaining the demurrer (Record page 14) recites: "The plaintiff having urged in opposition to said demurrer the provision of the constitution of the United States following to-wit: "No state shall * * * pass any * * * law impairing the obligation of contracts." The entire opinion of Justice Dodge, expressing the opinion of the state Supreme Court, and the entire dissenting opinion of Justice Bardeen, proceed upon the same view, that is, that the constitutionality of the legislative act was the only issue.

II.

If complaint is defective in not stating "presentation to the common council for allowance" and such defect may be availed of on demurrer, still if the charter of 1891 is unconstitutional and the plaintiff had the right to sue after presentation of its claim to the common council and disallowance or refusal to allow the same, as must be the fact, if the charter of 1891 is unconstitutional, then the judgment of the state court must be reversed.

NOTE 6. Spence vs. Spence, 17 Wis., 462 (448) at 469 (455);
Roe vs. Lincoln Co., 56 Wis., 66, 70;
Pine Valley vs. Unity, 40 Wis., 682, 685;
Kusterer vs. Beaver Dam, 52 Wis., 146, 149;
Flanders vs. McVicker, 7 Wis., 372.

If the demurrer was sustained on account that presentation of the account for allowance was not alleged, then the order and judgment should have been without prejudice. (Note 7).

On the contrary, the judgment is upon the merits. That is, upon the ground that the charter of 1891 was constitutional. The order sustaining the demurrer (record, p. 14) refers to the urging of the constitution of the United States, and refers to no other matter as having been presented or considered. Further, the judgment on demurrer stands upon, and is the enforcement of, the opinion of the state Supreme Court, which relates to no matter except the constitutionality of the charter of 1891.

A judgment resting on such a basis must be upon the merits. The opinion of the state Supreme Court may properly be adverted to show whether the judgment is without prejudice or upon the merits.

It is held in Ellis vs Northern Pacific Railroad Co. (Note 8), that an order sustaining a demurrer, and giving leave to plead over, stands as *res ajudicata;* that the order determined between the parties, conclusively, the matter considered on the demurrer, without any final judgment. Justice Winslow says (p. 465) "But the decision of this court upon a demurrer, upon the questions properly involved, cannot be reviewed by the circuit court, nor indeed, by this court, save upon motion for rehearing. Such questions are fianlly decided and settled for that case and, as between the parties to that litigation, for all time. * * * The question was no longer an open one."

To the same effect is Alley vs. Nott (Note 9.) Therein Mr. Chief Justice Waite said, (Page 475); "A demurrer to a complaint because it does not state facts sufficient to

---

NOTE 7. Rogers vs. Allis, 82 Wis., 509,

NOTE 8. 80 Wis., 459, 464-5.

NOTE 9. 111 U. S., 472, 475.

constitute a cause of action, is equivalent to a general demurrer to a declaration at common law, and raises an issue which, when tried, will finally dispose of the case as stated in the complaint on its merits, unless leave to amend or plead over is granted. The trial of such an issue is the trial of the cause, as a cause, and not the settlement of a mere matter of form in proceeding. There can be no other trial, except at the discretion of the court, and, if final judgment is entered on the demurrer, it will be a final determination of the rights of the parties which can be pleaded in bar to any other suit for the same cause of action."

If the present judgment stands, construed as it must be in the light of the opinion of the state court, then, it not only bars any subsequent action for this quarter's hydrant rental, but bars the plaintiff from urging, in any action upon any subsequently accruing quarter's hydrunt rental, the invalidity of the charter of 1891. (Note 10).

MOSES HOOPER,

For Plaintiff in Error.

NOTE 10. Beloit vs. Morgan, 74 U. S., 619;
Cangolle vs. Ferrie, 80 U. S., 465, 469;
Railroad vs. Missouri, 152 U. S., 301, 314-15.

No. 288. 75
Brf. of Defendant for Rehearing

Office Supreme Court U.S.
FILED
APR 7 1902
JAMES H. McKENNEY
Clerk.

BRIEF OF DEFENDANT.

Filed April 7, 1902.

Supreme Court of the United States

October Term 1901.

No. 288.

THE OSHKOSH WATER WORKS COMPANY,

PLAINTIFF IN ERROR.

vs.

THE CITY OF OSHKOSH.

In Error to the Supreme Court of the State of Wisconsin.

Supreme Court of the United States

October Term 1901.

No. 288.

THE OSHKOSH WATER WORKS COMPANY,
Plaintiff in Error,

vs.

THE CITY OF OSHKOSH.

In Error to the Supreme Court of the State of Wisconsin.

BRIEF OF DEFENDANT.

CASE.

The complaint, which contains two causes of action, is to recover $4,055.00 hydrant rentals, due October 1st, 1898, under contract made June 18th, 1883. (First cause of action record p. 9, 10, 11.) And the further sum of $1,060.00 for hydrant rental due October 1st, 1898, under contract entered into in August 31st, 1891. (Second cause of action, (record p. 11, 12.)

DEMURRER TO COMPLAINT.

That court has no jurisdiction of the person or subject matter; that the complaint does not state facts sufficient to constitute a cause of action. (Record p. 13.)

RESULT.

Demurrer sustained trial Court, decision affirmed by Wisconsin Supreme Court. (Record p. 14 and 16, 26.)

FORMER CHARTER.

In 1883, when the contract mentioned in first cause of action was

entered into, the City of Oshkosh, operated and existed under a Charter known as Chapter 183, P. and L. Laws of Wisconsin, 1883, the first section of which constituted it a municipal corporation by the name of the City of Oshkosh, and by that name capable of suing and being sued in all courts of law and equity.

It was therein provided, by Section 1, Chapter VII, "All moneys, credits and demands belonging to the city and wards of Oshkosh shall be deposited with and kept by the City Treasurer and shall be under the control of the Common Council and shall be drawn out only upon the order of the Mayor and City Clerk duly authorized by vote of the Common Council" and by Section 10, Chapter VII.

"Any account or demand against the City, before acted upon or paid, the Council may require the same to be verified by affidavit, except salaries and the amounts previously fixed or determined by law."

PRESENT CHARTER.

(In March, 1891, the former city charter of 1883 was superseded by Chapter 59, P. & L. Laws of Wisconsin, 1891, the same being the present Charter,) the first section of which constituted defendant a municipal corporation by the name of the City of Oshkosh, and by that name capable of suing and being sued in all courts of law and equity, and it was therein provided by Section 2, Chapter VII,

"All funds in the City Treasury shall be under the control of the Common Council and shall be drawn out upon the order of the Mayor and Clerk, countersigned by the Comptroller and authorized by a vote of the Common Council", and by Section 4, Chapter XXI;

"No action shall be maintained by any person against the City upon any claim or demand until such person first shall have presented his claim or demand to the Common Council for allowance and the same shall have been disallowed in whole or in part; provided that failure of such Common Council to pass upon such claim within sixty days after the presentation of such claim shall be deemed a disallowance thereof;" and by section 5, Chapter XXI,

"The determination of the Common Council disallowing in whole or in part any claim shall be final and conclusive, and a bar to any

action in any court founded on such claim, unless an appeal be taken from the decision of such common council as in this act provided."

Section 6, Chapter XXI, provided for the appeal in case of disallowance in whole or in part, to be accomplished by serving a written notice of the appeal on the City Clerk within twenty days after the disallowance of the claim and by executing a bond to the city in the sum of $150.00, with two sureties to be approved by the City Attorney and Comptroller, conditioned for the faithful prosecution of the appeal and payment of costs, whereupon the clerk is required to transmit the decision and a brief statement of the proceedings and all papers to the clerk of the Circuit Court of the County where "*such case shall be entered, tried and determined in the same manner as cases originally commenced in said Court.*"

CLAIMS NOT DISPUTED.

The provisions of Charter of 1883, and Charter 1891, relating to the payment of claims, when the same are undisputed are similar.

It will be observed that where there is no dispute as to the claim or demand the provisions in regard to demand and payment out of the city treasury, only upon a vote of the Common Council are practically identical.

CLAIM DISPUTED.

It is only when the correctness of the claim is challenged, that any difference in the two charters is discovered, such difference being a modification of the procedure. In other words a change in the steps and proceedings necessary to give jurisdiction to the Court. *That is all.*

REMEDY.

Under the Charter of 1883, after demand, the Common Council had the right to require an affidavit of the correctness of the claim.

If claim remained unpaid, and claimant sought to enforce collection, the remedy, a suit at law *commenced by the service of a summons.* This gave the court jurisdiction.

Under the Charter of 1891, this proceeding was changed, *a notice of appeal* and bond for costs were substituted for the summons, permissible under charter of 1883. It is obvious that the charter of

1891 is only a change in the procedure, nothing more than a slight modification of the manner in which the court acquires jurisdiction of disputed claims.

This is the only change in the remedy, *in all other respects the laws of Wisconsin, relating to the enforcement of a contract liability remained the same.*

A proper notice of appeal and bond confers jurisdiction upon the Circuit Court, formerly a summons, duly served was sufficient.

I call particular attention to the fact that *after the court once acquires jurisdiction* the same proceedings are open to plaintiff as were at its command under the former charter, all the rights that formerly existed as to the procedure and final determination of the action are specifically preserved by the charter of 1891, it expressly says, "*such case shall be entered, tried and determined in the same manner as cases originally commenced in said court.*" (Section 6, Chapter XXI.)

It is only in the manner of conferring jurisdiction upon the court, of disputed claims, that the legislature has changed the remedy.

This change of procedure, provided by the amended or new charter of City of Oshkosh, it is claimed by plaintiff in error, in so far as the same relates to *the first cause of action* (contract of June 18th, 1883,) impairs the obligation of that contract, and therefor contravenes the provisions of the Constitution of the United States following, to-wit, "No State shall * * * pass any * * * law impairing the obligation of contracts."

There is no merit to this claim; the change complained of is a simple one, it is only in the mode of procedure, no right of plaintiff is taken away, an adequate and efficacious remedy is left.

There is a distinction but no difference between these remedies, one is as adequate as the other.

LAWS EFFECTING REMEDY.

"The right of a creditor to any particular remedy is not a vested right in the continuance of any special mode of procedure, on the perpetuation of any remedy or remedial process which can be modified or abolished with out impairing or taking away the right itself."

2 Beach, Modern Law Contracts, S. 1667. Bird vs. Keller, 77 Maine, 270. Chaffe vs. Aaron, 62 Miss., 29. Rich vs. Flanders, 39 N. H., 304.

"A particular remedy existing at the time of the making of a contract, may be abrogated altogether, without impairing the obligation of the contract, if another, and equally adequate remedy for the enforcement of that obligation remains, or is substituted for the one taken away."

2 Beach, Modern Law of Contracts, 1667. New Orleans, etc., Co., vs. State of Louisiana, 157, U. S., 219. Connecticut etc. Ins. Co. vs. Cushman, 108 U. S., 51. McGahey vs. Virginia, 135 U. S. 693.

It is the settled law that "over mere remedial procedure the power of the legislature is absolute; that laws regulating it involve so much the consideration of public convenience and welfare, that individuals cannot be conceded vested right therein"; that

"Changes of remedy for the enforcement of legal contracts will be valid even though the new remedy be less convenient than the old, or less prompt and speedy;" that

"It is the power of the legislature to amend, change or modify the laws governing proceedings in courts, both as to past and future contracts, if they leave the parties a substantial remedy, according to the course of justice as it existed at the time the contract was made;" that

"The legislature may alter or vary existing remedies as they please, provided that in so doing their nature and extent is not so changed as materially to impair the rights and interests of the parties; that

"The legislature may enact a statute of limitations by which the remedy upon existing contracts, if not prosecuted within a specified time may be entirely defeated. So they may pass acts abolishing imprisonment for debts previously contracted, recording acts by which the older grant of real estate otherwise valid, is postponed and rendered void, as to a younger one, and other acts of similar nature; and yet such acts will be sustained as constitutional and binding;" that

"So far as the constitution of the United States, or of Wisconsin, reaches or effects the alterations of the remedy on contracts such alterations are matters of sound discretion with the legislature. It has the power within the limits of the constitution to control the remedy and to determine whether any change or modification of it is necessary, and what change, and whether parties to the contract are left with substantial remedy according to law, as it existed before the change, subject however to a final determination by the courts of the constitutionality of such modifications or changes."

Many cases can be found in the notes in the elementary treatise by me cited, sustaining the above propositions. These rules of law are clearly established.

Cooley's Constitutional Limitations, 285, 286 and cases in notes.

Beach on Modern Law of Contracts, 2nd addition, sections 1666, 1667, 1668, and cases in notes

Among the important cases in Wisconsin bearing upon this question are the following:

Lightfoot vs. Cole, 1 Wis., 26–33; Von Banbach vs. Bade, 9 Wis., 559; Starkweather vs Hawes, 10 Wis, 125; Cornell vs. Hitchens, 11 Wis, 368; Strenbell vs. Railway, 12 Wis., 67; Oatman vs. Bond, 15 Wis., 20; State ex rel Soutter vs. Madison, 15 Wis. 30; Paine vs. Woodwith, 15 Wis., 299; Hasbrouck vs. Shipman, 16 Wis., 296; Selsby vs. Redlon, 19 Wis., 17; Nelson vs. Roundtree, 23 Wis., 367; Sydnar vs. Palmer, 32 Wis., 406, 410; Northwestern Mutual Ins. Co. vs. Neeves, 46 Wis., 147; Lee vs. Buckheit, 49 Wis., 54; Rosenthal vs. Wehe, 58 Wis., 621; Hall vs. Banks, 79 Wis., 229; Second Ward Savings Bank vs. Schrank, 97 Wis., 450; Eau Claire Bank vs. Macanley, 101 Wis. 304; Penn. L. & C. Works vs. Union O. P. Co., 100 Wis. 488.

"It being determined that the remedy or laws for enforcement of a contract existing at the time it is made enter into it and form a part of its obligation, it might perhaps be supposed that any repeal, change or amendment of such remedy or laws which in any manner delayed or rendered the enforcement of the contract less complete and

effective would be unconstitutional and void; but such is not the case; all the authorities agree that it is within the power of the legislature to repeal, amend, change or modify the laws governing proceedings in courts, both as to past and future contracts, so that they leave the parties a substantial remedy according to the course of justice as it existed at the time the contract was made." Von Bambach vs. Bade, 9 Wis., 577.

The following from Bronson vs. Kinzie, 1 How., U. S., 311, "Although a new remedy may be deemed less convenient than the old and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. *Whatever belongs merely to the remedy may be altered according to the will of the state provided the alteration does not impair the obligation of the contract.* But if that effect is produced it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the constitution," has been approved and adhered to by the Supreme Court of Wisconsin. Examination and comparison will show that the decisions of the Wisconsin Supreme Court are in harmony with the decisions of the United States Supreme Court, upon the proposition here presented.

The Supreme Court of the U. S. in McCullough vs. Virginia, 172 U. S., pages 102–124, has declared the rule to be as follows: "it is equally well settled that changes in the forms of actions and modes of proceedings do not amount to an impairment of the obligations of the contract *if any adequate and efficacious remedy be left.*"

Applying these principles of law to the question here presented we have but to inquire, the purpose and intent of the amendment to the City Charter (Law of 1891), and determine, whether it leaves the plaintiff an adequate remedy. In other words, does chapter 59, P. & L. laws of Wisconsin, 1891, provide an "adequate and efficacious remedy" for the enforcement of plaintiffs contract.

It has already been pointed out and is an undisputed fact, that claimant by presenting its claim to Common Council, if disallowed, can, by taking a proper appeal, prosecute the claim to final judgment in the same manner and under precisely the same rules of

pleading and practice as it could do if the action was commenced by summons.

A proper appeal is equivalent to a summons, the result the same, viz: Court acquires jurisdiction, after that practice and proceeding identical in either case including trial on merits and judgment.

Section 6, Chapter XXI. Ch. 59, Laws 1891.

The charter of 1891 does not deprive the plaintiff of an adequate remedy, but on the contrary provides one. It is a reasonable and substantial procedure for the enforcement of all contract obligations. It is only the substitution of another "equally adequate and efficacious" remedy. A remedy substantially equivalent to the ordinary action at law.

PLAINTIFF'S BRIEF.

SUB. I AND II.

No cases are cited that conflict with the law as claimed by the defendant. With the decisions of the Supreme Court of Wisconsin cited by plaintiff in error, regarding appeals to Circuit Court from action of Common Council in disallowing claims, I find no fault. None of those questions are here presented.

By those decisions plaintiff seeks to establish that the remedy provided by charter 1891 is not adequate, is not efficacious. In all those cases plaintiffs did not comply with the law. If they had, the court would have acquired jurisdiction. Those decisions are not here for review. The law is plain, and easy to comply with, the procedure as simple as the drawing of a summons.

A notice of appeal takes the place of a summons, it is served upon the clerk, instead of upon the mayor. When accompanied by a sufficient bond, the clerk makes return to Circuit Court, where the case is "entered, tried and determined" as though commenced by summons.

What right has been invaded here? Wherein does plaintiff suffer? Where is there "any minute detail," where any "tortuous filtering process," through the Common Council. I fail to see any just reason for complaint. In Railroad Company vs. Hecht, 95 U. S., page 168, held, "where charter of corporation required service of process

on its president, a subsequent statute authorizing service on other officers held not to impair the contract."

In Perkins vs. Watertown, 5 Biss. 320, held, Law authorizing service of process on mayor or clerk may be changed to require service on mayor without impairing obligation of contract.

It is urged, that the bond if not in compliance with the statute is not amendable, and if no new bond is furnished within the time, the court fails to acquire jurisdiction, these objections are too immaterial to receive serious consideration. In speaking of these objections the Supreme Court of Wisconsin in Oshkosh Water Works Company vs. City of Oshkosh, 109 Wis., page 223, says: "Some of these changes are too immaterial to require extended comment. Service of notice of appeal on the city clerk in lieu of summons on mayor is clearly so."

"Nor are we impressed with the importance of the asserted inability of a claimant to cure defects in procedure by amendment.

"It can hardly be said that there is any vested right to make mistakes, a variance of policy as to liberality in permitting amendment cannot be said to impair the obligation of any contract."

"The fact that a failure to obtain judgment by reason of errors in procedure or lack of proof which in ordinary practice would result only in non-suit, leaves claimant barred of his claim, no more effects the obligation than does a statute of limitations leaving reasonable time to sue, but expiring before the defectiveness of an attempted suit is discovered." Terry vs. Anderson, 95 U. S. 628; Koshkonong vs. Burton, 104 U. S. 668; Mitchel vs. Clark, 110 U. S. 633; Relyea vs. Tomahawk P. & P. Co., 102 Wis. 301.

"It certainly comes no nearer such obligation than does an act taking away one's right to a second trial as of course after a judgment in ejectment."

Snydor vs. Palmer, 32 Wis. 406.

Another objection urged is that a claim must be presented to Common Council and await its disallowance either by express action, or by non-action, which occurs in sixty days after presentation, during which time he has no right to sue.

"It will be observed that while unconstitutionality has been ascribed to legislation which directly postponed the ultimate acts for the enforcement of a contract right, as by staying execution or creating or extending period of redemption from judicial sales. (Barnitz vs. Beverly, 163 U. S. 118) No case has been cited to us, and none discovered, where reasonable delay resulting *incidentally from the requirement of certain new steps in procedure or from the enlargement of time for taking such steps*, has been held fatal, provided such legislation did not clearly appear to be in bad faith, and for the purpose of defeating or impairing the obligations of the contract. Oshkosh Water Works Company vs. City of Oshkosh, 109 Wis. 224.

Modifications of proceedings imposing either increased burdens or increased time, have been recognized as legitimate exercise of legislative power over remedies and procedure.

Von Bambach vs. Bade, 9 Wis., 559, Starkweather vs. Hawes, 10 Wis., 125; Lee vs. Buckheit, 49 Wis., 54. Relyea vs. Tomahawk, P. and P. Co., 102 Wis., 301. Vance vs. Vance, 108 U. S. 514. Clark vs. Martin, 49 Pa. St., 299.

In answer to the dissenting opinion of Justice Barden herein, Record p. 28, I quote the following from the opinion of the Court, rendered by Mr. Justice Dodge.

"The requirement that before invoking judicial action the claimant must submit his claim to consideration of the Common Council is not a serious burden upon him. *In practical affairs the instances are rare if not unknown, that a claimant commences suit until he has first invited payment without suit.* The effect of the charter of 1891, is to limit, not enlarge, the period necessary to constitute a demand and refusal of payment. In the matter of demands against municipalities the importance of momentary opportunity to sue is far less than with individual debtors, who during even a few days may by transfer of property or otherwise become execution proof, and thus defeat the purpose of an action."

The only remaining obstacle to judicial hearing and enforcement which appellant urged upon our attention is the requirement of a bond for costs in the sum of $150. This is in itself hardly a new

burden; for our practice statutes have since long prior to 1883, subjected plaintiffs to a security for costs, in the discretion of the court, in still larger amount. Independently of this view, however, the absolute requirement that a plaintiff shall furnish reasonable security for costs, as prerequisite to suit, cannot be considered so completely a denial of adequate remedy as to impair the obligation of existing contracts. It is a very usual requirement of practice statutes and rules. If our statutes were changed so that such a preliminary were absolutely required by law for all suits, instead of being permissibly required by the court as now, we apprehend there could be no doubt that such change is within the legitimate control of the legislature over procedure. Such is the suggestion in Oatman vs. Bond, 15 Wis., 20. But counsel urges that the bond is not amendable, and a mistake therein is fatal to the cause of action. The answer to this suggestion is that no mistake need be made. *The charter, in terms easy of comprehension, if carefully read, prescribes what the bond shall be, and compliance therewith is not difficult.* A law which lays out a plain and adequate course for one to secure judicial enforcement of his contract does not impair the obligation because one straying out of the prescribed path cannot reach the goal. But, again, counsel says the statutory requirement that the bond be approved by the city attorney and comptroller renders it possible for those officers, either wilfully or by neglect, to exclude him from his remedy in court. Whether this be so has not yet been decided. If an appellant files a good and sufficient bond in compliance with law, it is by no means certain that the courts cannot coerce proper action of such city officers, at least so far as is possible without invading the field of their discretion. But it is not an impairment of the obligation of a contract to make the remedy dependent for certain steps upon the performance by public officers of their duties.

The duty of the city attorney and comptroller to approve a proper bond is one cast on them by law, for breach of which one injured may have his remedy, as well as against the sheriff on whom he must depend for enforcement of an execution. All remedies depend upon performance of duty by public officers, and by breach thereof may fail. That is true even of the privilege of action in the courts,

wherein breach of duty by the judge might most effectually postpone or entirely defeat the claim; but such possibility does not render the remedy inadequate."

SUB. III.

WITHDRAWAL OF PROPERTY FROM EXECUTION.

It is claimed that property is withdrawn from execution, that under charter of 1883, judgment could be rendered on non-payment and execution could be had on which all property of the city not exempt could be seized and sold.

In regard to enforcing the collection of a judgment obtained against the city, the law remained the same after the amendment of 1891.

On examination of the 1883 charter provisions, cited in brief of plaintiff. I find equivalent provisions in the charter of 1891. The provisions of both charters are quoted in full.

OLD CITY CHARTER.	PRESENT CITY CHARTER.
Chapter 183, Laws of 1883.	Chapter 159, Laws of 1891.
Sec. 19, Sub Chapter XIV.	Sec. 31, Sub Chapter XXIII.
"No real or personal property of any inhabitant of said city, or of any individual or corporation, shall be levied on and sold by virtue of any execution issued to satisfy or collect any debt, obligation or contract of said city."	"No real or personal property of any inhabitant of said city, or of any individual or corporation thereof, shall be levied on and sold by virtue of an attachment or execution issued to satisfy or collect any debt, obligation or contract of said city; nor shall any person or corporation be held liable as garnishee of said city."
Sec. 23, Sub Chapter XIV.	Sec. 34, Sub Chapter XXIII.
"The said city may lease, purchase and hold real or personal estate sufficient for the convenience of the inhabitants thereof, and may sell and convey the same, and they shall be free from	"The said city may lease, purchase and hold real estate or personal estate sufficient for the convenience of the inhabitants thereof, and may sell and convey the same, and they shall be free from

taxation while owned by the city."

Sec. 28, Sub. Chapter XIV.

"When the city of Oshkosh deed or sell any real estate or any interest therein owned by said city the party of the first part shall be the city of Oshkosh, and the person or persons authorized to execute such deed or lease need not be named in the body thereof."

Sec. 29, Sub Chapter XIV.

"The Mayor of said city is hereby authorized, when the Common Council shall by ordinance or resolution for that purpose, describing the real estate and interest to be conveyed, order and direct him so to do, to execute a deed or lease of such real estate or interest therein belonging to said city, the said deed or lease shall be signed by the Mayor of said city and countersigned by the City Clerk, and sealed with the corporate seal of said city and duly entered and acknowleged as is provided by law for the execution of deeds and leases."

Sec. 30, Sub Chapter XIV.

"When any such deed or lease is so executed, the City Clerk shall attach to such deed or lease a true and attested copy of such ordinance or resolution and the same shall be recorded by the register of deed with the said

taxation while owned by the city."

Sec. 38, Sub Chapter XXIII.

"The Mayor and City Clerk of said city are hereby authorized, when the Common Council shall (by ordinance or resolution for that purpose, describing the real estate and interest to be conveyed) order and direct them to do so, to execute a deed or lease of such real estate or interest therein belonging to the said city, and the said deed or lease shall be signed by the Mayor and City Clerk, sealed with the corporate seal of said city, duly witnessed and acknowledged, as is provided by law for the execution of deeds and leases; provided, that all leases shall be countersigned by the comptroller."

Sec. 39, Sub Chapter XXIII.

"When any such deed or lease is so executed, the City Clerk shall attach to such deed or lease a true and attested copy of such ordinance or resolution, and the same shall be recorded by the register of deeds with the said

deed or lease, and each copy so attached and recorded shall be in all courts of the state prima facie evidence of the authority of such Mayor to make and execute such deed or lease."

deed or lease, and such copy so attached and recorded, shall be in all courts of this state, prima facie evidence of the authority of such Mayor to make and execute such deed or lease."

The Revised Statutes of Wisconsin 1878, Section 2982, Sub. 16, exempted virtually all the city property from execution.

This statute was in force at the time contract of plaintiff was entered into and has remained the law ever since.

Then as now the only recourse of a judgment creditor in collecting his judgment against a city was by mandamus to compel the levy of taxes, to pay the same.

The plaintiff says "no action can be brought upon an allowed claim so no judgment can be secured."

The claim when allowed, defacto, becomes a judgment.

A mandamus can be at once issued to levy tax to pay the allowed claim, equally and as promptly as upon a judgment.

Gutta Percha vs. Ashland, 100 Wis., 232.

An allowed claim draws interest same as a judgment.

GOOD FAITH OF THIS LEGISLATION.

That this legislation was adopted in absolute good faith, has never been questioned, and its only purpose was to regulate the remedy. Under the charter of 1883, the plaintiff could present his claim to the council, whether just or unjust he could do so to every successive council for six successive years, the city never knew whether he intended to enforce his claim by suit or not. If the Common Council which contracted the claim, had knowledge of any legal or equitable defense thereto, and accordingly, would refuse payment, claimant could abide his time, subject only to statute of limitation, and present the same again and again until a council and city officials were elected which, through inadvertance or lack of information would allow the claim, even if unjust, the claim could be held indefinitely and resurrected at such time in the future as would prove convenient, subject

only to statute of limitation. It could be called up when every officer or member of the council who had knowledge thereof had passed away.

The new legislation is to the effect that when claims presented to the Common Council are not allowed, plaintiff must commence his action by serving a proper notice of appeal and bond, so that the city may have knowledge, of a contest at a time when the facts and reasons for refusal of payment are known to the officers then administering the affairs of the city. Has not a city the right to know, within a reasonable time after it has disallowed a claim, whether or not its decision is final?

Our Supreme Court has in many cases particularly those cited by plaintiff, fully recognized, and emphasized the necessity and wisdom of this and parallel legislation.

In Seegar vs. Ashland, 101 Wis., 518, a conclusive reason was given for this change in legislation relating to enforcing money demands against municipalities. The Court says, "The purpose of this legislation is obvious, namely, that the public treasury shall be free from the peril of repeated solicitation of successive councils or other public officers by claimants. It is to protect not only against the persistent cupidity of claimants but against the yielding thereto of public officials.

"The legislature has deemed it necessary to throw these burdens upon the claimants and restrictions upon the municipal officers in order to protect the public moneys of the municipalty, and we can not review the wisdom nor impair the efficacy of its enactment were we at all inclined to do so."

SECOND CAUSE OF ACTION.

Error is claimed, in concluding as a matter of law that the contract of August 31st, 1891, (instead of October 1st, 1891, as stated in plaintiff's brief) for extension of mains was not constitutionally impaired by charter of 1891.

I call attention to the fact; this contract was a new contract, wholly independent of the other, by which the city was to locate a

hydrant every 528 feet on new or additional water mains to be laid as ordered and to pay $40.00 per hydrant per annum, payments to be made quarterly.

This contract was entered into August 31, 1891, (complaint, sub. IX, X, record, page 11.)

Chapter 183 of P. and L. Laws of Wisconsin, 1883, the former charter was not then in force.

The present charter, chapter 59, P. and L. Laws of Wisconsin, 1891, had been passed by the legislature and had already been in force since March 23rd, 1891, and for over five months had been the law.

Chapter 59, P. and L. Laws of Wisconsin, 1891. Published March 23rd, 1891.

The contract mentioned in the second cause of action having been entered into after the present charter had become the law, the second assignment of error is clearly frivolous. It was not even argued in the Court below, "The only assignment of error argued by appellant is that the Court erred in holding that the charter of the city of Oshkosh, chapter 59, laws of Wisconsin, did not, so far as it relates to the contract of June 18th, 1883, impair the obligation of the contract." (Record, p. 16.)

Appellant's brief in this Court, is silent as to second assignment of error. Certainly it cannot seriously be claimed that chapter 59, laws 1891, could effect the obligation of a contract which was not made until after such law had been in full force and effect for five months and more.

CONCLUSION.

This amended charter lays out a plain and adequate course for one to secure judicial enforcement of his contract, it is no more difficult to draw a notice of appeal and a bond, than it is to draw a summons.

How can it be said that the obligation of the contract is impaired?

How can it be said that no adequate remedy is left?

To arrive at such conclusion, the reasoning must of necessity be "tortuous."

Has a party, through his attorneys, a vested right to make mistakes, and because he may have failed to follow the directions of a plain law, to say that such a law, in consequence of mistakes by him made impairs the obligation of the contract he is seeking to enforce? I think that, the reasoning of Supreme Court of Wisconsin, "A law which lays out a plain and adequate course for one to secure judicial enforcement of his contract *does not impair the obligation because one straying out of the prescribed path cannot reach the goal*," also, "All remedies depend upon performance of duty by public officials and by breach thereof may fail. That is true even of the privilege of action in the courts wherein breach of duties by the judge, might most effectually postpone or entirely defeat the claim, but such possibility does not render the remedy inadequate," (record, p. 27,) meets all the objections, conjectures, presumptions, possibilities, and quibbles regarding possible action, caprice or misbehavior of city officials suggested by counsel for plaintiff. Especially is this true when there is an adequate remedy for any one who may sustain damage, by reason of a breach of the duty cast upon public officials by law.

That the change of legislative policy as to procedure upon claims against Oshkosh and many other cities, was adopted in the utmost good faith, with no legislative purpose other than promotion of public welfare and proper protection of public funds against unlawful demands cannot be doubted.

Putnam vs. Rubican, 32 Wis., 498; Seegar vs. Ashland, 101 Wis., 515.

This legislation did not change or defeat or impair the obligation of the city of Oshkosh to pay the hydrant rental, it did not destroy any right of plaintiff to enforce his claim in the courts.

It did not withdraw property of city from execution. *It made no change whatever between the city of Oshkosh and the Oshkosh Water Works Company so far as contract obligations were concerned.*

The city was not relieved from performing anything, which it obligated itself to do.

On the other hand it simply substituted a notice of appeal and bond in place of a summons. It provided a simple, plain, adequate proceeding, which is easy to comply with.

It slightly modified the procedure for commenment of action. It made a proper appeal a substantial equivalent to a summons. The notice of appeal and bond for costs being the commencement of suit instead of summons.

It left the practice and proceeding, including trial upon merits and judgment, and enforcement thereof the same.

I submit that within the meaning of the constitution of the United States, the remedy afforded by the charter of 1891, is, adequate, is efficacious, is in every way a substantial equivalent to the remedy afforded by charter of 1883.

Respectfully submitted,

JOHN F. KLUWIN,

City Attorney and Attorney for Defendant.

Supreme Court of the United States.

No. 75.—October Term, 1902.

The Oshkosh Waterworks Company, Plaintiff in Error, vs. The City of Oshkosh. } In error to the Supreme Court of the State of Wisconsin.

[January 5th 1903.]

Mr. Justice Harlan delivered the opinion of the Court.

This case presents a question under the clause of the Constitution of the United States which prohibits a State from passing a law impairing the obligation of contracts.

The question arose upon demurrer by the defendant, the city of Oshkosh, to the complaint filed against it on the 16th day of June 1900 by the Oshkosh Waterworks Company, a municipal corporation of Wisconsin. The principal ground of demurrer was that the complaint did not state facts sufficient to constitute a cause of action.

The complaint set forth two causes of action, on the first one of which the company claimed a judgment for $4,085, which was alleged to be due from the city under an agreement made between it and the company on June 18th 1883 in reference to the building and maintaining by the company of a waterworks plant for supplying water for domestic and fire purposes, and the renting of public fire hydrants.

On the second cause of action the company asked a judgment for $1,060, which amount was claimed under an agreement of the 31st day of August 1891 having reference to the company's extensions of its then existing mains, and the rentals to be paid by the city for hydrants to be located on such extensions.

After the contract of 1883 was made the charter of the city was amended and revised—the revision taking effect March 23d 1891. The revised charter contained certain provisions as to suits against the city, imposing on suitors conditions or restrictions that did not previously exist.

The company insisted that the revised charter could not be applied to this suit without impairing the obligation of its contracts with the city. This view was rejected by the State court, the demurrer was sustained and the suit dismissed.

The general principles which must control in determining whether a State enactment impairs the obligation of contracts have become so firmly established by the decisions of this court that any further discussion of

their soundness would be inappropriate. It is only necessary to recall them, and then ascertain their applicability to the particular State legislation now alleged to be repugnant to the Constitution of the United States.

It is well settled that while, in a general sense, the laws in force at the time a contract is made enter into its obligation, parties have no vested right in the particular remedies or modes of procedure then existing. It is true the Legislature may not withdraw all remedies, and thus, in effect, destroy the contract; nor may it impose such new restrictions or conditions as would materially delay or embarrass the enforcement of rights under the contract according to the usual course of justice as established when the contract was made. Neither could be done without impairing the obligation of the contract. But it is equally well settled that the Legislature may modify or change existing remedies or prescribe new modes of procedure, without impairing the obligation of contracts, provided a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract. *Green* v. *Biddle*, 8 *Wheat.* 1, 85; *Bronson* v. *Kinzie*, 1 *How.* 311, 317; *Planters' Bank* v. *Sharp*, 6 *How.* 301, 327; *Walker* v. *Whitehead*, 16 *Wall.* 314, 317; *Murray* v. *Charleston*, 96 *U. S.* 432, 438; *Edwards* v. *Kearzey*, 96 *U. S.* 595, 601; *Vance* v. *Vance*, 108 *U. S.* 514, 518; *McGahey* v. *Virginia*, 135 *U. S.* 685, 693; *Barnitz* v. *Beverly*, 163 *U. S.* 118; *McCullough* v. *Virginia*, 172 *U. S.* 102, 104. The decisions of the Supreme Court of Wisconsin as to what are to be deemed laws impairing the obligations of contracts are in harmony with the decisions of this court. *Lightfoot* v. *Cole*, 1 *Wis.* 26, 34; *Von Baumbach* v. *Bade*, 9 *Wis.* 559; *Pame* v. *Woodworth*, 15 *Wis.* 298; *Northwestern Mut. Ins. Co.* v. *Neeves*, 46 *Wis.* 147; *Lee* v. *Buckheit*, 49 *Wis.* 54; *Rosenthal* v. *Wehe*, 58 *Wis.* 621.

Having these principles in view, we proceed to inquire whether the revised charter of Oshkosh so changed existing remedies for the enforcement of contract rights against municipal corporations as to impair the obligation of the contract made in 1883 between the Waterworks Company and the city.

By the act of the Wisconsin Legislature revising and amending the charter of the city of Oshkosh, that municipal corporation was made capable of suing and being sued in all courts of law and equity. *Laws of Wisconsin*, 1883, *vol.* 2, *p.* 687, *c.* 1, § 1. The same act provided that all moneys, credits and demands of the city should be under the control of the common council, and "be drawn out only upon the order of the mayor and city clerk, duly authorized by the vote of the common council." *Ib. p.* 724, *c.* 7, § 1. It was further provided that "any account or demand against the city, before acted on or paid, the council may require the same to be verified by affidavit, except salaries and amounts previously fixed or determined by law, and any person who shall falsely swear to any such amount or demand shall be deemed guilty of perjury, and shall be punished according to law." *Ib. p.* 726, *c.* 7, § 10.

The Supreme Court of Wisconsin, in its opinion, states that except for the above restrictions upon the payment of money, the city of Oshkosh was, in 1883, subject to be sued upon contract liability like any private person or corporation.

But by the city's amended charter of 1891 certain changes were made, and the question is whether those changes, if applied to the contract of 1883, would impair its obligation. 2 *Laws of Wisconsin*, 1891, *p.* 321, *c.* 59.

The revised charter retained substantially the above provisions in the charter of 1883, and the following, among other, additions, were made:

"§ 4. No action shall be maintained by any person against the city upon any claim or demand until such person shall first have presented his claim or demand to the common council for allowance, and the same shall have been disallowed in whole or in part: *Provided*, That the failure of such common council to pass upon such claim within sixty days after the presentation thereof shall be deemed a disallowance thereof.

"§ 5. The determination by the common council disallowing in whole or in part any claim shall be final and conclusive and a bar to any action in any court founded on such claim, unless an appeal shall be taken from the decision of such common council as in this act provided.

"§ 6. Whenever any claim against the city shall be disallowed in whole or in part by the common council, such person may appeal from the decision of such common council disallowing said claim to the Circuit Court of the county in which the city is situated, by causing a written notice of such appeal to be served on the clerk of the city within twenty days after making the decision disallowing such claim; and by executing a bond to the city in the sum of one hundred and fifty dollars, with two sureties, to be approved by the city attorney and comptroller, conditioned for the faithful prosecution of such appeal, and the payment of all costs that shall be adjudged against the appellant in the Circuit Court. The clerk, in case such appeal is taken, shall make a brief statement of the proceedings had in the case before the common council with its decision thereon and shall transmit the same, together with all the papers in the case, to the clerk of the Circuit [Court] of the county. Such case shall be entered, tried and determined in the same manner as cases originally commenced in such court: *Provided, however*, That whenever an appeal is taken from the allowance made by the common council upon any claim, and the recovery upon such appeal shall not exceed the amount allowed by the common council exclusive of interest upon such allowance, the appellant shall pay the costs of appeal, which shall be deducted from the amount of the recovery; and when the amount of costs exceed the amount recovered, judgment shall be rendered against the appellant for the amount of such excess." *Ib. p.* 412, *c. XXI*, § 6.

It is not alleged in the complaint that the Waterworks Company before commencing this action presented its claims to the common council for allowance.

The company contends that if the above provisions are construed to mean what the Supreme Court of Wisconsin have declared similar provisions in other municipal charters to mean then such burdens and restrictions have been imposed upon the enforcement of its contract with the city of Oshkosh as to impair its obligation. This suggestion renders it necessary to ascertain the import of those decisions.

In *Drinkwine* v. *City of Eau Claire*, 83 *Wis.* 428, 430, it appeared that Drinkwine preferred a claim against the city of Eau Claire, which was disallowed by the common council. He appealed from that action of the council, and executed a bond, which recited that he had appealed to *the Circuit Court of Eau Claire County*, and conditioned for the payment of all costs that should be adjudged against him by *the court aforesaid*, and not generally by *the court*, as prescribed by the statute. It was contended that the bond was insufficient since, in the event of a change of venue in the case, the surety would not be bound by a judgment for costs in the court that actually tried the case. After referring to prior cases in that and in other courts, particularly to *Sharp* v. *Bendell*, 10 *Ill.* 88, in which it had been held that if an appellant failed to comply substantially with the requirements of the statute in relation to the perfecting of appeals the Circuit Court did not acquire jurisdiction of the person of the opposite party or of the subject matter, and should dismiss the appeal, the Supreme Court of Wisconsin said: "The liability of a surety is *strictissimi juris*, and cannot be extended by implication. He has a right to stand on the exact words of his contract. . . . The deviation from the statutory requirement is one of substance. The surety may have been quite willing to enter into the judgment to pay the costs, if the appellant should be defeated on a trial in Eau Claire County, in the city where the alleged cause of action arose, and quite unwilling to undertake for the payment of the costs, in like event, in a trial in a distant county, greatly increased by the travel of witnesses and the costs of subpœnaing them. A similar ruling in *Myres* v. *Parker*, 6 *Ohio St.* 502–504, sustains the conclusion at which we have arrived, that the bond under consideration is not a substantial compliance with the statute." The ruling in the Drinkwine case was reaffirmed in *Oshkosh Waterworks Co.* v. *City of Oshkosh*, 106 *U. S.* 85, and in other cases.

In *Mason* v. *Ashland*, 98 *Wis.* 540–547, it was held that, under the charter of the city of Ashland, the right of appeal from the disallowance of a claim by the common council was perfect at the expiration of sixty days from the filing of the claim with its clerk, and that the claimant "was obliged to exercise it within the twenty days allowed by statute, or be for-

ever barred from thereafter prosecuting his claim in any court"—citing *Fleming* v. *Appleton*, 55 *Wis.* 90, and *Kock* v. *Ashland*, 83 *Wis.* 361.

In *Telford* v. *City of Ashland*, 100 *Wis.* 238, it was adjudged that as the objection that the appeal was not taken within twenty days after the adverse action of the council goes to the jurisdiction of the subject matter, it may be raised for the first time in the appellate court.

In *Segar* v. *City of Ashland*, 101 *Wis.* 515, it was held that under a provision in a city charter to the effect that in case any person presented his claim or demand against the city, which the common council disallowed in whole or in part, the council "shall not again consider or allow such claim," and its failure to act upon a claim within sixty days after being presented was equivalent to a disallowance—the right to appeal therefrom expiring in twenty days after such disallowance.

Accepting these decisions as our guide in determining the meaning and effect of the provisions in the revised charter of Oshkosh, we perceive no reason for holding that the change in remedies made by that charter impair, in the constitutional sense, the obligation of the contract of 1883 between the Waterworks Company and the city.

The requirement that a claim or demand against the city should be presented to the common council and be disallowed, in whole or in part, before the city can be subjected to suit upon it, is a reasonable regulation for the protection of the city against the cost of unnecessary litigation. It does not affect the substance of the creditor's right, without being unreasonably delayed, to institute an action against the city. It only stays his hand until the city has full opportunity to look into his claim before paying or refusing to pay it. Nor does the above regulation unduly obstruct the creditor; for, by it the city is in effect allowed only sixty days for such examination, and the creditor is protected against a vexatious or indefinite delay by the provision that the failure of the council, for sixty days, to pass upon the claim shall be deemed a disallowance thereof, and the creditor may at once appeal to the Circuit Court of the county. In that court the necessary issues can be framed, under the direction of the court, and according to the usual modes of pleading, and the rights of the parties judicially ascertained and enforced.

Equally without merit is the objection to that clause of the revised charter making the disallowance of a claim, in whole or in part, by the council, final and conclusive, unless an appeal be taken to the Circuit Court of the county within a prescribed time. We take it that the purpose of that provision was to protect the public against the dangers attending persistent and frequent applications to the common council after it had once acted and to compel claimants to proceed with promptness while all the facts connected with their demands were fresh in the minds of the members of the council. This is a wholesome regulation, of which no creditor can

justly complain, since the charter enables him, without serious delay, after the disallowance of his claim, to invoke the jurisdiction of a court of general jurisdiction for the enforcement of such claim.

But it is earnestly insisted by the Waterworks Company that the provision requiring an appeal from the disallowance of a claim to be perfected within twenty days thereafter is so unreasonable, in the matter of time, as, by its necessary operation, to impair the obligation of its contracts with the city. We cannot assent to this view. The time within which the creditor must perfect his appeal is undoubtedly short. But it is sufficient for the purpose of enabling him to get his case, with reasonable dispatch, into the Circuit Court and have its judgment as to his claim against the city, with the same right that other litigants have to take the case to the highest court of the State. Here again is disclosed the purpose of the Legislature to bring to a speedy conclusion all disputes as to claims against the city. It surely was competent for the Legislature to effect such an object, and it cannot be said, as matter of law, that a provision requiring the creditor within twenty days after the disallowance of his claim to serve notice of appeal on the city clerk materially affects or obstructs the presentation of his claim to the proper Circuit Court.

Objection is also made to the requirement in the new charter that the appeal bond shall be approved by both the city attorney and comptroller. In support of that objection it is said that one or the other or both of those officers *might* be absent from the city at the time the bond is tendered by the creditor; also, that one or both of them *might* object to the bond when he ought to accept it as sufficient. But these contingencies may never arise. They certainly have not arisen in respect of the claim of the Waterworks Company, for it is not alleged that the company ever presented its claim to the common council for allowance, and consequently had no occasion to tender the city attorney and comptroller an appeal bond. Besides, it is not at all clear that the revised charter requires, as a condition of the right to appeal, that a bond be executed by the creditor within twenty days after the disallowance of his claim by the common council. It does expressly require that the notice of appeal shall be served within that time on the clerk of the city, but no such absolute requirement is made as to the time within which the appeal bond must be executed. It may be that a construction that would defeat the creditor's appeal, because of the absence of the city attorney and comptroller, or either of them, at the time a bond is tendered for their approval, or a refusal to approve a bond that was sufficient, would make the revised charter, in its application to such a case, repugnant to the contract clause of the Constitution. But no such case is now presented, and no such question as that suggested need be now decided. It should not be assumed that the right of appeal will be lost where the creditor has done all that was re-

quired in order to perfect his appeal. As the Waterworks Company does not allege that it presented its claim to the common council for allowance, it is not in a position to ask a judicial determination of a question that cannot arise in this case.

Another objection remains to be noticed. It is founded on the decision in *Drinkwine* v. *City of Eau Claire*, above cited, in which it was held that the appeal bond provided in the charter of Eau Claire must relate to costs as adjudged by the Circuit Court, and not by the Circuit Court of any named county. We have seen what were the reasons that governed the Supreme Court of Wisconsin in so interpreting a provision similar to the one here in question in the revised charter of the city of Oshkosh. If that interpretation was, as suggested, too technical it would not follow that the charter thus construed would impair the obligation of contracts. It would be extraordinary if this court should hold the new remedies and modes of procedure provided by the revised charter to be illegal because of the possibility that a creditor might, by mistake or carelessness, execute a bond not conditioned, as required by that charter, for the payment of the costs adjudged by the Circuit Court, generally, but by a named Circuit Court.

As to the contention that the obligation of the contract of August 31st 1891 was impaired by the revised charter, it is sufficient to say that that charter went into operation March 23d 1891. The contract of 1891 was a new contract, it dependent of that of 1883, and the Waterworks Company could not therefore say that its obligation was impaired by a statute in force at the time the contract was made. The contract clause of the Constitution of the United States has reference only to a statute of a State enacted after the making of the contract whose obligation is alleged to have been impaired. *Lehigh Water Co.* v. *Easton*, 121 *U. S.* 388, 391; *Pinney* v. *Nelson*, 183 *U. S.* 144, 147; *New Orleans Waterworks Co.* v. *Louisiana*, 185 *U. S.* 336, 351. If, however, the agreement of 1891 had such connection with that of 1883 that they may be regarded as one agreement, then what has been said as to the application of the revised charter to the contract of 1883 applies, in all respects, to that of 1891. The obligation of neither contract was impaired by the charter of 1891.

We have noticed all the points that require consideration, and adjudge, therefore, that the changes made by the revised charter of Oshkosh in respect of remedies for the enforcement of claims against that city provided for its creditors a substantial and adequate remedy, and therefore did not impair the obligation of contracts with that municipal corporation.

The judgment of the Supreme Court of Wisconsin must be affirmed.

It is so ordered.